OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 32

August 14, 2006
Daniel E. Shearouse, Clerk
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner/Respondent,

v.

Willie Earle Reese, Jr., Respondent/Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26195
Heard June 8, 2006 - Filed August 7, 2006

AFFIRMED IN PART; REVERSED IN PART

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General William Edgar Salter, III; and Solicitor W. Barney Giese, all of Columbia, for Petitioner-Respondent.

Jack B. Swerling, of Columbia, for Respondent-Petitioner.

JUSTICE MOORE: Willie Earl Reese, Jr. was convicted of murder and sentenced to imprisonment for thirty-five years. The Court of Appeals reversed Reese's conviction, holding that the trial judge erred in: (1) failing to charge the jury on involuntary manslaughter; and (2) denying Reese's motion for a mistrial based on the solicitor's closing argument. *State v. Reese*, 359 S.C. 260, 597 S.E.2d 169 (Ct. App. 2004). Chief Judge Hearn filed a dissenting opinion. We granted petitions for writs of certiorari filed by the State and Willie Earl Reese to review the decision of the Court of Appeals reversing Reese's conviction for murder. We affirm in part and reverse in part.

FACTS

Willie Earl Reese and Teresa Reese were married in 1999. In April 2001, Teresa left the marital home and moved in with her parents, Cora and Donald Joyner. On April 28, 2001, Teresa and her cousin Edith played in a softball game and, afterwards, went to a bar with other team members. While Teresa was away, Reese called her parents' house three or four times looking for Teresa. Reese also drove around the neighborhood for several hours while Teresa was out and finally parked at the end of the street where Teresa's parents lived. Phone records indicated that, between 9:45 p.m. and 2 a.m., Reese called Teresa's cell phone fifty-one times.

Teresa and Edith left the bar at approximately 1:30 a.m., with Edith following Teresa home. When they arrived at the neighborhood where Teresa was living with her parents, Edith noticed Reese stopped at a stop sign in front of the street where Teresa's parents lived, sitting in his car. Teresa stopped and spoke briefly to Reese, then drove to her parents' home. Edith and Reese followed Teresa home. When Edith got out of her car to determine whether Teresa was all right, she noticed Reese exiting his car and walking calmly towards Teresa. Edith saw Teresa and Reese standing on the sidewalk talking as she drove to her home, two houses away. When Edith entered her house, she called Teresa. While dialing the number, she heard Reese's car drive away. Edith spoke to Cora, who went to check on Teresa. When Cora saw Teresa lying on the sidewalk, she began to scream. Edith

returned to Cora's house and saw Teresa lying on the sidewalk with her eyes wide open and blood running down the side of her ear.

Later on the morning of April 29, 2001, Reese turned himself in to police. He took police to his parents' home, where he had hidden the gun with which he shot Teresa, and to his aunt's home, where he left his car. In his statement to police, Reese admitted shooting Teresa. However, he stated that he did not go to her house to kill her. According to Reese, he was upset and crying while talking to Teresa. He pulled the gun out and told Teresa he was going to kill himself. When Teresa tried to talk him out of killing himself, Reese was "moving the gun back and forth as a reaction." Reese stated he did not know why the gun went off because he thought both of the gun's safeties were on. The evidence showed the gunshot wound which killed Teresa was from the gun being either very close to, or in contact with, Teresa's head.

The trial judge charged the jury on murder and denied Reese's requests for charges on involuntary manslaughter and accident. The jury found Reese guilty of murder.

THE STATE'S ISSUES

I. Did the Court of Appeals err in holding Reese was entitled to an involuntary manslaughter instruction?

II. Did the Court of Appeals err in holding a mistrial should have been granted based on the solicitor's closing argument?

DISCUSSION

Involuntary Manslaughter

The State argues the Court of Appeals erred in holding Reese was entitled to an involuntary manslaughter instruction. We agree.

If there is any evidence warranting a charge on involuntary manslaughter, then the charge must be given. *State v. Cabrera-Pena*, 361 S.C. 372, 605 S.E.2d 522 (2004); *State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999). Involuntary manslaughter is the killing of another without malice and unintentionally while engaged in either: (1) an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) a lawful act with reckless disregard for the safety of others. *State v. Cabrera-Pena, supra*; *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996).

It is a felony for a person to present or point at another person a loaded or unloaded firearm. S.C. Code Ann. § 16-23-410 (2003). Suicide is an unlawful act. *State v. Levelle*, 34 S.C. 120, 13 S.E. 319 (1891), *overruled on other grounds, State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).

Reese argues that the jury could have found he was not pointing or presenting a firearm or in the process of committing suicide, but was merely ***threatening*** to commit suicide, which is not an unlawful act.

Although the jury could have found Reese's statement that he was moving the gun back and forth did not constitute ***pointing*** a firearm, and threatening suicide has not been classified as an unlawful act, there is no doubt that Reese was ***presenting*** a firearm when he took the gun out and began waiving it around. Therefore, Reese was pointing or presenting a firearm, a felony, which would preclude an involuntary manslaughter charge. Accordingly, the Court of Appeals erred in holding Reese was entitled to an involuntary manslaughter instruction.

Closing Argument

The State argues the Court of Appeals erred in holding Reese was entitled to a new trial based on the solicitor's closing argument. We disagree.

In his closing argument, the solicitor asked the jury,

> Who speaks for Teresa Reese? In this system of justice that we have in this type of case, who speaks for Teresa Reese? That is the question that has been asked since April the 29th . . . of this year, since the day she died. From the time that Willie Earl Reese was arrested, the time that he initially appeared in court, through the Grand Jury proceedings, when he was placed on the trial docket, when his case was called on Monday, when you jurors with your fellow jurors assembled downstairs before Judge Manning, during the process of you being selected for this case, from opening statements of Ms. Campbell and Mr. Swerling through the presentation of the testimony and the submission of evidence, through the closing remarks of Ms. Campbell and Mr. Swerling and as I stand before you, Madam Forelady and Ladies and Gentlemen, the question is: Who speaks for Teresa Reese? And I submit to you that that question can be answered and will be answered today.

After he argued the evidence showed Reese was guilty of murder, the solicitor again asked, "Who speaks for Teresa Reese?" Reese objected to the argument, and the trial judge overruled the objection, stating he would hear counsel on the motion later. The solicitor then continued, "So now I ask you, now that all the evidence is in upon my argument, who speaks for Teresa Reese? You do, Madam Forelady and Ladies and Gentlemen of the Jury. . . . You do. You speak for her. . . You can speak for her with your verdict. . . . And so you, the State submits, will speak for her with your verdict, with your verdict." Again, Reese's objection to the argument was overruled.

Following the jury charge, Reese was allowed to place on the record his motion concerning the solicitor's argument. He contended the solicitor's argument asking the jury to speak for Teresa exceeded the bounds of permissible argument, personalized the issue to the jury, and injected inflammation and passion into the trial. Accordingly, Reese moved for a mistrial. The motion was denied. When Reese later asked the trial judge for a curative instruction concerning the solicitor's argument, the judge denied the request.

A solicitor's closing argument must be carefully tailored not to appeal to the personal biases of the jury. *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004), *cert. denied*, 544 U.S. 943 (2005). The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom. *Id*.

Jurors are sworn to be governed by the evidence, and it is their duty to consider the facts of the case impartially. *Id.* A Golden Rule argument asking the jurors to place themselves in the victim's shoes tends to completely destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice. *Id.*

On appeal, the solicitor's argument will be reviewed in the context of the entire record. *State v. Copeland***,** 278 S.C. 572, 300 S.E.2d 63 (1982). Once the trial judge has allowed the argument to stand, the accused has the burden of proving that the argument denied him a fair determination of guilt or innocence. *Id.* In order to constitute reversible error, it must be shown that the argument so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Darden v. Wainwright*, 477 U.S. 168 (1986); *Donnelly v. DeChristoforo,* 416 U.S. 637 (1974); *Von Dohlen v. State*, *supra*.

The solicitor's argument indisputably asked jurors to abandon their impartiality and view the evidence from Teresa's viewpoint. Therefore, the Court of Appeals correctly held the argument was improper.

There is no doubt that, after repeatedly trying to get in touch with her, driving around her parents' neighborhood, and finally stopping at the entrance to the neighborhood to wait for her return, Reese shot Teresa in the head at very close range while presenting a firearm. However, because the evidence of Reese's intent is disputed, the evidence of malice is not overwhelming.

Murder is the killing of any person with malice aforethought, either express or implied. S.C. Code Ann. § 16-3-10 (2003). Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. *State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 63 (1998). It is the doing of a wrongful act intentionally and without just cause or excuse. *Tate v. State*, 351 S.C. 418, 570 S.E.2d 522 (2002).

According to Reese, he did not intend to kill Teresa, but the gun discharged by accident. The only evidence of malice was inferred. *Sellers v. State*, 362 S.C. 182, 607 S.E.2d 82 (2005) (malice may be inferred from the use of a deadly weapon); *State v. Watson*, 349 S.C. 372, 563 S.E.2d 336 (2002) (malice may be inferred from an act so reckless as to manifest depravity of mind and disregard of human life). Whether Reese had the required malice aforethought for murder was a question for the jury. Therefore, the evidence of Reese's guilt was not overwhelming, and the solicitor's improper Golden Rule argument deprived Reese of a fair trial.

REESE'S ISSUES

Because we hold a new trial is warranted, it is unnecessary for us to address the issues raised by Reese.

CONCLUSION

We reverse the decision of the Court of Appeals holding that Reese was entitled to an involuntary manslaughter instruction. However, we hold that Reese was prejudiced by the solicitor's improper Golden Rule argument since the question of malice was in contention. Accordingly, we affirm the Court of Appeals' decision reversing Reese's conviction and remanding the case for a new trial.

AFFIRMED IN PART; REVERSED IN PART.

TOAL, C.J., WALLER, J., and Acting Justice Howard P. King, concur. BURNETT, J., dissenting in a separate opinion.

JUSTICE BURNETT: I respectfully dissent in part. I agree with the majority's conclusion the Court of Appeals erred in finding Reese was entitled to an involuntary manslaughter charge. I also agree the solicitor's closing argument was improper; however, in my opinion, this error was harmless because of the overwhelming evidence of Reese's guilt.

When guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, this Court will not set aside a conviction for insubstantial errors not affecting the result. State v. Livingston, 282 S.C. 1, 6, 317 S.E.2d 129, 132 (1984).

In the testimony developed at trial, Reese admitted he possessed a gun, waved it back and forth, and shot Teresa, but he claimed the gun accidentally discharged. Several witnesses testified Teresa died from a single gunshot wound to the head which was either very close to or directly against her head. Regardless of Reese's allegation that he did not have an express intent to kill Teresa, his actions rise to the level of implied malice. See S.C. Code Ann. § 16-3-10 (rev. 2003) (Murder "is the killing of any person with malice aforethought, either express or implied."); State v. Campbell, 287 S.C. 377, 379, 339 S.E.2d 109, 109 (1985) ("The implication of malice may arise from the use of a deadly weapon. A deadly weapon is generally defined as 'any article, instrument or substance which is likely to produce death or great bodily harm.'") (internal citations omitted).

The undisputed evidence in this case unequivocally demonstrates Reese killed Teresa while feloniously presenting a firearm. Based on this overwhelming evidence of Reese's guilt, I conclude the solicitor's improper comments during closing argument were harmless beyond any reasonable doubt.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Debra M. Therrell, Petitioner,

v.

Jerry's Inc. d/b/a Jerry's Travel Center, Employer, and American Alternative Insurance Company, Carrier, Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26196
Heard July 6, 2006 – Filed August 7, 2006

AFFIRMED AS MODIFIED

William P. Hatfield and Robert D. McKissick, both of Hyman Law Firm, of Florence, for Petitioner.

Paul Linwood Hendrix, of Jones and Hendrix, of Spartanburg, for Respondents.

CHIEF JUSTICE TOAL: In this case, the court of appeals affirmed the workers' compensation commission's decision to award recovery for a torn rotator cuff as a scheduled loss for the loss of an arm. We affirm, but modify the decision as outlined below.

FACTUAL/PROCEDURAL BACKGROUND

Debra M. Therrell (Petitioner) tore her right rotator cuff when she fell while working as a waitress at Jerry's Travel Center.[1] Petitioner sought medical treatment for her injury, eventually undergoing arthroscopic surgery, and ultimately filed for workers' compensation benefits.

A single commissioner classified Petitioner's rotator cuff injury as an injury to Petitioner's "right upper extremity" and determined the injury resulted in a loss of twenty percent of Petitioner's use of her right arm. Accordingly, the commissioner awarded Petitioner a twenty percent recovery under S.C. Code Ann. § 42-9-30(13) (1976) (providing the scheduled recovery for the loss of an arm). Petitioner appealed to the full workers' compensation commission, arguing that an award under the scheduled loss of an arm provision was improper because her injury was to her shoulder, not her arm. The full commission affirmed the single commissioner's decision, but increased Petitioner's disability rating to thirty percent.

On appeal, the circuit court focused on the deferential standard of review regarding factual and evidentiary matters in workers' compensation cases and affirmed the full commission's decision. The court emphasized

[1] The rotator cuff is a group of muscles, ligaments, and cartilage attaching the humerus (armbone) to the chest. J. STANLEY MCQUADE, DETERMINING DISABILITY & PERSONAL INJURY DAMAGE, MEDICAL EVALUATIONS FOR TRIAL LAWYERS, 284-85 (1984). The shoulder socket consists of the clavicle (collarbone) and the scapula (shoulder blade). *Id*. Petitioner also injured her left knee in the fall. This case, however, does not involve the portion of the award designated for Petitioner's knee injury.

that Petitioner presented the bulk of the evidence of her impairment in terms of the impact of the injury on her ability to use her arm. Similarly, the court of appeals affirmed the circuit court's decision; focusing on Petitioner's description of her injury as affecting her arm and on the fact that the medical evidence in the record rated Petitioner's injury as an impairment of the "right upper extremity." *Therrell v. Jerry's Inc.*, 360 S.C. 314, 318, 600 S.E.2d 127, 129 (Ct. App. 2004).

This Court granted certiorari to review the court of appeals' decision, and Petitioner raises the following issue for review:

> Under South Carolina workers' compensation law, is recovery for a torn rotator cuff limited to the scheduled recovery for the loss of an arm?

STANDARD OF REVIEW

The Administrative Procedures Act governs appellate review of the workers' compensation commission's decision. Accordingly, this Court will not substitute its judgment for that of the commission as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-380(A)(6) (2005). Additionally, this Court may reverse or modify the commission's decision if Petitioner has suffered the appropriate degree of prejudice and the commission's decision is effected by an error of law or is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." *Id*.

LAW/ANALYSIS

Petitioner argues that compensation for a torn rotator cuff should not be limited to the scheduled recovery for the loss of an arm. We agree.

S.C. Code Ann. § 42-9-30 (2005) sets forth what is commonly referred to as the "scheduled" scheme of workers' compensation recovery. Specifically, the statute details a formula for calculating compensation awards for several types of injuries. Although the scheduled injury statute

refers mostly to injuries resulting in the loss of particular members of the body, subsection 42-9-30(18) provides that a fraction of the award allowed for the loss of a member is recoverable for an injury resulting in the *loss of use* of a member.[2]

The instant case calls on this Court to interpret this loss of use provision. While Respondents allege the commission properly determined that Petitioner was limited to recovery for the scheduled loss of use of her arm, Petitioner alleges she should instead have received an award under § 42-9-30(20) for the loss of a member, organ, or part of the body not specifically listed in the compensation statutes or regulations. Thus, the question presented is most accurately restated as "whether compensation for a torn rotator cuff is limited to the scheduled recovery for the loss of use of an arm, or whether the injury is instead an unscheduled injury under § 42-9-30(20)."[3]

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[2] Sections 42-9-10 and -20 detail the alternative system of recovery, commonly referred to as "general disability." To seek a general disability award, a claimant who has suffered a scheduled injury must show that the injury affects some other part of his body and has resulted in a loss of earning capacity. *Singleton v. Young Lumber Co.*, 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960).

[3] Notably, Respondents characterize the commission's decision as a "factual determination" that the Petitioner's upper extremity impairment applied to her right arm. Thus, Respondents urge this Court to apply the highly deferential standard of review due an administrative agency's determinations of that type. We disagree. The question of whether Petitioner sustained an injury would be a question of fact. In contrast, the question of under what subsection a rotator cuff injury is compensable is a question of statutory construction, which this Court reviews *de novo*. *See Gilliam v. Woodside Mills*, 319 S.C. 385, 387, 461 S.E.2d 818, 819 (1995) (deciding as a matter of law that a hip socket is not part of the leg for workers' compensation purposes); *Charleston County Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843, (2005) (holding that determining legislative intent is a question of law); *and* S.C. Code Ann. § 1-23-380(A)(6)(d) (2005).

This is a novel issue for this Court. Petitioner's and Respondents' views of this issue essentially represent two competing approaches to scheduled recovery schemes. Under Respondents' approach, which we will call the "functional impairment" view, the functional impairment that results from an injury is dispositive for determining under what schedule an injury is paid. *See Langton v. Rocky Mountain Health Care Corp.*, 937 P.2d 883, 884 (Colo. Ct. App. 1996). Applied to this case, Petitioner would be due compensation for any scheduled body part that is functionally impaired by her rotator cuff injury. Respondents contend that because Petitioner has only suffered the partial loss of use of her arm, she should recover only a scheduled award under § 42-9-30(13). Admittedly, this view is somewhat appealing because part of the goal of workers' compensation is to alleviate "the loss or impairment of an employee's capacity to earn." *Singleton*, 236 S.C. at 470, 114 S.E.2d at 845 (quoting *Burnette v. Startex Mills*, 195 S.C. 118, 121, 10 S.E. 164, 166 (1940)). Thus, it seems completely reasonable to award compensation for an injury based only on the "functional impairments" it causes.[4]

In contrast, the "situs of the injury" approach focuses on the injured body part in determining how the injury is properly compensated. Applied to this case, Petitioner argues that because her injury was to her shoulder and not her arm, a scheduled award for the loss of use of her arm is improper. This approach is most persuasively justified by the argument that in some cases, limiting recovery for some injuries to the member or body part that

[4] Interestingly, however, the full quote in *Singleton* implies that the scheduled recovery scheme is partially focused on compensating the claimant for his or her physical ailments, independent of any loss of functional ability. 236 S.C. at 470, 114 S.E.2d at 845 (stating that workers' compensation is designed to compensate for functional loss and "not to indemnify for any physical ailment or impairment as such, *except in the classes of case specifically provided in the Act*.") (emphasis added). Accordingly, this weighs slightly against applying the functional impairment view to South Carolina's scheduled recovery scheme.

suffers the functional impairment does not adequately compensate for the actual injury which occurred.[5]

We hold that South Carolina's statutory scheme best complies with the situs of the injury approach, and contrasts sharply with Colorado's rigid functional limitation analysis. The Code provides that an injury to *any* unlisted member, organ, or part of the body may be compensated by determining the ratio that the resulting impairment bears to the "whole person." S.C. Code Ann. § 42-9-30(20) (2005). Far from enunciating a privileged list of scheduled injuries and focusing on the functional limitations caused by an injury, our scheduled recovery scheme specifically provides that the lists of injuries in the Code and in the regulations are not exclusive. *Id*; 25A S.C. Code Ann.Regs. 67-1101(B) (1976). Instead, the Code requires the commission to convert injuries to unscheduled members into a percentage of impairment to whole person pursuant to either the American Medical Association's "Guides to the Evaluation of Permanent Impairment" or "any other accepted medical treatise or authority." 25A S.C. Code Ann.Regs. 67-1101(B) (1976). Accordingly, South Carolina courts are relieved from

[5] Although Petitioner asserts that other jurisdictions "unanimously" adopt this view, Colorado stands with at least two other jurisdictions in limiting compensation for shoulder injuries to the schedule for the loss of use of an arm. *See Hagen v. Labor & Industry Review Comm'n*, 563 N.W.2d 454, 457-58 (Wis. 1997) (finding Wisconsin's scheduled member statute ambiguous and deferring to the commission's "long-standing view" that a shoulder injury is measured as a loss of an arm at the shoulder); *and Castro v. Gillette Group, Inc.*, 479 N.W.2d 460, 463 (Neb. 1992) (stating in a conclusory fashion that a shoulder injury whose only residual signs of damage was persistent pain in the arm was an injury to a "scheduled member"). In *Owens-Illinois, Inc. v. Douglas*, the Georgia court of appeals initially termed the injury a shoulder injury, but later clarified that the claimant suffered a fracture of the head of the humerus, the upper arm bone. 260 S.E.2d 509, 511 (1979). Thus, the injury in *Douglas* was an arm injury, and the case does not support the functional limitation view.

performing the complicated calculus involved in translating a rotator cuff injury into a percentage of lost use of the arm and other scheduled members.[6]

Additionally, the conclusion that our scheduled recovery scheme focuses on the site of the injury in determining the type of proper compensation finds support in this Court's case law. In *Gilliam v. Woodside Mills*, an employer argued that the hip joint was part of the leg, and that the claimant should therefore have been confined to the scheduled recovery for the loss of a leg. 319 S.C. at 387, 461 S.E.2d at 819. Disagreeing, this Court

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[6] The regulations' specific reference to the "AMA Guides" is particularly instructive. In announcing that its scheme held strongly to the functional limitation view, the Colorado court expressly disregarded the AMA Guides and stated that the resource was "irrelevant under the situs of the functional impairment test." *Langton*, 937 P.2d at 884. (footnote continues)

Academically, a true application of a functional limitation analysis would not be distinctly different from analyzing an injury under the situs of the injury view. We believe part of the harm courts see in compensating every shoulder injury as merely a scheduled loss for the loss of use of an arm is that some shoulder injuries affect other parts of the body as well. *See Bumpus v. Massman Const. Co.*, 145 S.W.2d 458, 461 (Mo. 1940) (stating that limiting a shoulder injury to the scheduled loss of an arm meant the commission disregarded the injury's effects on other portions of the claimant's body); *see also Bray v. Carrothers Const. Co.*, 293 P. 504, 506 (Kan. 1930) (where one end of a fractured clavicle protruded backwards and into the shoulder muscles, the court held that while the loss of use of the proximate arm may have been sufficient to *support* an award for the scheduled loss of an arm, the fact that the arm was affected did not justify *limiting* the award to that schedule). Under a true "functional limitation" view, the proper approach would be to analyze the limitations caused by the shoulder injury beyond the arm and into the back, neck, and other areas of the body. In awarding compensation based upon an unscheduled injury's percentage of impairment to the whole person, § 42-9-30(20) performs exactly this analysis.

held that for workers' compensation purposes, the hip socket is part of the pelvis and not part of the leg. *Id*.

Undeniably, *Gilliam* stands for the proposition that our scheduled compensation scheme focuses on the site of the injury and not the resulting functional limitation. Accordingly, we hold that a rotator cuff injury is not properly compensable under the loss of use of an arm schedule. Instead, the proper course in these cases is to proceed pursuant to § 42-9-30(20) and use the AMA Guides or "any other accepted medical treatise or authority" to convert the injury to the rotator cuff into a percentage of impairment to the whole person.[7]

Turning to the instant case, however, we believe Petitioner is procedurally barred from receiving the relief she requests from this Court. Before the single commissioner, Petitioner claimed that her shoulder injury entitled her to a general disability award under § 42-9-10. The commissioner disagreed and found Petitioner was precluded from seeking such an award by

[7] Respondents argue that under the AMA Guides, a shoulder injury is to be converted to an injury to the upper extremity. While we agree in part, this argument stops short of what the statute requires. Section 42-9-30(20) clearly provides that otherwise unscheduled injuries are to be converted to a percentage of impairment to the whole person. Additionally, because the AMA Guides describe the "upper extremity" as consisting of the hand, wrist, elbow, and shoulder, translating a shoulder injury into a percentage of "upper extremity" impairment would be of no use in determining the proper listed schedule for recovery. *See* AMA GUIDES, 13.

In addition to *Gilliam*, both parties discuss *Roper v. Kimbrell's of Greenville*, 231 S.C. 453, 99 S.E.2d 52 (1957). We find, however, that *Roper* has little to do with the instant case. In *Roper*, an employee suffered a separated shoulder, and the commission awarded benefits under the former version of the loss of an arm schedule. *Id*. at 454-55, 99 S.E.2d at 53-54. Because the employer, and not the claimant, contested the award on appeal, the Court was not forced to consider the claimant's entitlement to an award for the shoulder injury beyond the scheduled recovery for loss of an arm.

the inability to show a loss in earning capacity. Before the appellate panel, Petitioner again sought a general disability award, and continued to describe her injury in terms of its effects on her ability to use her arm.

In order to seek an award under § 42-9-30(20), Petitioner should have introduced evidence supporting this claim at these initial proceedings. In our view, Petitioner's requested relief is incredibly instructive. Petitioner asks for the case to "be remanded to the workers' compensation commission for a determination as to the proper ratio for a shoulder injury as it bears to the whole man." Petitioner did not present any evidence of the percentage of impairment to her shoulder, and furthermore, as Respondents point out, "Petitioner did not introduce any evidence to establish that the shoulder has a higher value in relation to the whole man . . .[i]ndeed, the AMA Guides establish just the opposite . . . ."

As this Court has stated, the burden is on the claimant to prove that an injury is compensable within the act. *Walker v. City Motor Car Co.*, 232 S.C. 392, 396, 102 S.E.2d 373, 374 (1958). Though the workers' compensation commission carries the duty to determine how an injury is compensable, the commission makes this decision based on submitted evidence, not out of thin air. To grant the relief Petitioner seeks, we would need to allow Petitioner to present the commission with evidence not found in the record on appeal; effectively providing Petitioner with a "second bite at the apple." This case does not justify such a significant departure from our rules.

Accordingly, we hold that the commission's decision is not clearly erroneous in view of the reliable, probative, and substantial evidence in the record. The vast majority of the evidence in the record, including Petitioner's own testimony, describes Petitioner's injury only in terms of its effects on her ability to use her arm.

We believe a factor driving much of the confusion on this issue is that the scheduled member statutes speak in a different language from medical service providers and the AMA Guides. While the scheduled member statutes use terms like "arm" and "leg," the AMA guides classify unscheduled injuries according to their effect on a person's "upper or lower

extremities." *See* AMA GUIDES, 20, 85 (providing tables converting various impairments from the upper and lower extremities to percentages of impairments to the whole person).

The instant case illustrates how this disconnect can be problematic. We take this opportunity to emphasize the need for the commission to examine the particular injury at issue in every case to determine how a physician's or medical service provider's impairment rating is properly applied; either to a listed schedule, or translated to a percentage of impairment to the whole person pursuant to the AMA Guides.

CONCLUSION

For the foregoing reasons, we modify the court of appeals' decision, and affirm.

WALLER, BURNETT and PLEICONES, JJ., and Acting Justice J. Ernest Kinard, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Bobby Watson, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal from Chesterfield County
John M. Milling, Circuit Court Judge

Opinion No. 26197
Submitted June 21, 2006 – Filed August 14, 2006

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Karen C. Ratigan, all of Columbia, for Petitioner.

Assistant Appellate Defender Eleanor Duffy Cleary, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: The post-conviction relief ("PCR") court granted Bobby Watson ("Watson") a new trial, finding that counsel was ineffective for eliciting and failing to object to improper hearsay testimony. This Court granted the State's petition to review the PCR judge's decision. We reverse.

FACTUAL / PROCEDURAL BACKGROUND

In 1999, a nine year old child accused Watson of sexual abuse. The victim made the allegation to her grandmother, who subsequently took the victim to a pediatrician. The pediatrician was unable to discover any evidence of abuse. However, a pediatric nurse practitioner, who specializes in conducting such examinations, later examined the victim more extensively. The nurse found that the victim's condition was consistent with past sexual abuse.

At trial, the victim testified about several incidents of abuse which occurred between 1997 and 1999. She also identified Watson as the perpetrator. Further, several witnesses testified regarding the victim's allegations. In addition to identifying the time and place of the abuse, the witnesses recalled the victim's statements to them regarding the abuse and identified Watson as her abuser.

Watson was convicted of first degree criminal sexual conduct with a minor and lewd act upon a child. He was sentenced to concurrent terms of thirty years for criminal sexual conduct with a minor and fifteen years for lewd act upon a child. The court of appeals affirmed Watson's convictions and sentences. *State v. Watson*, 353 S.C. 620, 579 S.E.2d 148 (Ct. App. 2003).

Watson filed an application for PCR, alleging that counsel was ineffective in failing to object to improper hearsay testimony. The PCR court found that counsel's only strategic reason for allowing the testimony without

objection was that the testimony was "merely cumulative." As a result, the PCR court granted Watson relief. The State appeals raising the following issue for review:

> Did the PCR court err in finding that counsel was ineffective for failing to object to the introduction of hearsay testimony?

STANDARD OF REVIEW

In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This Court gives great deference to the PCR court's findings of fact and conclusions of law. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000) (citing *McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995)). On review, a PCR judge's findings will be upheld if there is any evidence of probative value sufficient to support them. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). If no probative evidence exists to support the findings, this Court will reverse. *Pierce v. State*, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000) (citing *Holland v. State*, 322 S.C. 111, 470 S.E.2d 378 (1996)).

LAW / ANALYSIS

The State contends that the PCR court erred in finding that counsel was ineffective for failing to object to the introduction of hearsay testimony. We agree.

"The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies." *Dawkins v. State*, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001) (citing *Jolly v. State*, 314 S.C. 17, 20, 443 S.E.2d 566, 568 (1994)). One exception to the rule allows limited corroborative testimony in criminal sexual conduct cases when the victim testifies. *Id*; Rule 801(d)(1)(D), SCRE. The corroborative testimony is restricted to the

victim's complaint of the time and place of the sexual assault. *Dawkins*, 346 S.C. at 156, 551 S.E.2d at 262. Any other details or particulars, including the perpetrator's identity, must be excluded. *Id.* at 156, 551 S.E.2d at 263.

This Court has held that the failure to object to improper hearsay testimony in a criminal sexual conduct case because the testimony is merely cumulative to the victim's testimony is not a reasonable strategy where the evidence is not overwhelming or the improper testimony bolsters the victim's testimony. *Dawkins*, 346 S.C. at 157, 551 S.E.2d at 263. However, where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992).

In this case, several witnesses testified about the abuse allegations against Watson. The victim's grandmother testified that the victim said, "Grandmomma, ah, Buster assaulted me sexually."[1] Additionally, a department of social services investigator and two psychologists testified that the victim had identified Watson as her abuser. One of the psychologists also provided detailed statements from the victim regarding the abuse, including statements such as "he stuck his thing in me." Portions of the corroborative testimony presented at trial were elicited by Watson's trial counsel. At no time did Watson's trial counsel object to the admission of the testimony.

At the PCR hearing, trial counsel testified that she did not object to the hearsay testimony because she wanted to avoid the possibility that the prosecution would have shown the video of the victim talking about the sexual abuse. Counsel stated that, "I used my own judgment. Had I objected, then they could have shown the video and shown the child again. And I did not think that was wise, to keep showing that. . . the child telling about the abuse over and over, and over, and the jury seeing the child telling that over and over and over." The PCR court found that Watson's trial counsel failed to object to the hearsay testimony because "it was merely cumulative of the victim's testimony."

[1] Watson is also known by the nickname "Buster."

While the PCR court correctly found that the testimony was inadmissible hearsay under Rule 801(d)(1)(D), SCRE, the PCR court erred in finding that counsel's strategic reason for failing to object was unreasonable. In its decision, the PCR court mischaracterized trial counsel's testimony at the PCR hearing. Counsel did not fail to object because of the cumulative effect of the corroborative testimony, but instead decided that objections to the corroborative testimony might lead to the more damaging introduction of the victim's videotape. Accordingly, we hold that counsel articulated a valid reason for failing to object to the hearsay testimony, and the PCR court erred in finding that counsel was ineffective in failing to prevent the introduction of the hearsay testimony.

CONCLUSION

For the above reasons, we reverse the PCR court's decision granting Watson a new trial.

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

JUSTICE PLEICONES: I respectfully dissent because, in my opinion, there is probative evidence in the record to support the PCR judge's finding that Respondent's trial counsel was ineffective in both failing to object to hearsay, and in eliciting that testimony on cross-examination. E.g.. Smith v. State, Op. No. 26161 (S.C. Sup. Ct. filed June 5, 2006). I would therefore affirm the PCR order granting Respondent a new trial.

The majority finds that trial counsel's failure to object to the hearsay evidence identifying Respondent as the perpetrator was not ineffective as it was the result of a valid strategic decision. I disagree. Trial counsel apparently believed that if she objected to the hearsay, it might lead to the State's introduction of a video tape in which the victim described the abuse. In fact, part of that tape was played at trial at trial counsel's request, and over the State's objection. Had the State wished, however, it could have sought to introduce the remainder of the tape following counsel's introduction of a portion of the interview. See State v. Cabrera-Pena, 361 S.C. 372, 605 S.E.2d 522 (2004). Further, to the extent trial counsel testified that she did not object to the improper hearsay testimony because counsel feared if she objected to the hearsay they would simply play the tape "over and over and over," her fear is grounded in a fundamental misunderstanding of the law. The State was not entitled to introduce the victim's prior consistent statement unless Respondent charged the victim with a recent fabrication or improper motive or influence. See Rule 801 (d) (1), SCRE. I simply do not understand how objecting to third party hearsay testimony that the victim had identified Respondent as her abuser could have opened the door to permit the State to play the interview tape.

In my opinion, no valid strategic decision explains trial counsel's failure to object to the hearsay testimony repeating the victim's identification of Respondent as her abuser. Magazine v. State, 361 S.C. 610, 606 S.E.2d 761 (2004) (counsel's strategy reviewed under "an objective standard of reasonable"). I would therefore affirm the PCR order.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Madison, a fictitious name of a mentally disabled person, through her court-appointed guardian, Brenda Bryant, Appellant,

v.

Babcock Center, Inc., a South Carolina corporation; South Carolina Department of Disabilities and Special Needs; and Michelle Batchelor, in her official and individual capacities, Respondents.

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 26198
Heard March 7, 2006 – Filed August 14, 2006

REVERSED

Orin G. Briggs, of Lexington, for Appellant.

Danny C. Crowe and R. Hawthorne Barrett, of Turner, Padget, Graham & Laney, P.A., of Columbia, for Respondents Babcock Center, Inc. and Michelle Batchelor.

William H. Davidson, II and Andrew F. Lindemann, of Davidson, Morrison, and Lindemann, P.A., of Columbia, for Respondent South Carolina Department of Disabilities and Special Needs.

ACTING JUSTICE COLE: In this appeal, we are asked to decide the novel issue of whether a private treatment center owes a duty to exercise reasonable care in supervising a mentally retarded person admitted to its care; the novel issue of whether a state agency which has a contract with the center owes a duty of care to the person; and whether the mentally retarded person in this case, as a matter of law, proximately caused her own injuries.

FACTUAL AND PROCEDURAL BACKGROUND

It is undisputed that Madison[1] (Appellant), now thirty-two years old, is a mentally retarded woman with disabilities and special needs. Babcock Center, Inc. (Babcock Center), its employee Michelle Batchelor, and the South Carolina Department of Disabilities and Special Needs (Department) in their answers admit Appellant "has been diagnosed as mildly mentally retarded" and is a "person with disabilities and special needs."[2]

Appellant was voluntarily admitted as a client in 1994, when she was twenty years old, to a residential home managed by Babcock Center. Babcock Center is a private, non-profit corporation based in Columbia that provides housing and other services for people with autism, mental retardation, head or spinal injuries, or related disabilities. Department has

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[1] Madison is a fictitious name. We will refer to her as Appellant for purposes of clarity even though the named plaintiff is her mother and guardian, Brenda Bryant.

[2] References to Babcock Center include the center and Batchelor, its employee. We will refer to the three defendants collectively as Respondents.

approved Babcock Center as a contractual provider of such services, and the program at issue in this case is the Community Training Home Program II. This residential program offers mentally retarded persons the opportunity to live in the community and receive individualized supervision and support services. Appellant alleges Department coordinates, directs, funds, and oversees the provision of services by contractual providers such as Babcock Center. Appellant further alleges Department, along with its county-based boards, is responsible for performing timely and adequate developmental evaluations of clients and assisting providers in determining the level of care and services required.

Appellant, although physically an adult, alleges she has the emotional and intellectual maturity of a seven- to ten-year-old child. She can read, write, and understand math at the level of a first- or second-grade child. Appellant alleges her mental disability means she is not able to live or work independently. She cannot, for example, cook, wash clothes, run bath water, use a toaster oven, put on her own makeup, or perform personal hygiene tasks without adult supervision. Appellant cannot tell time, understand a sequence of dates or use a calendar, make change for a dollar, or give or follow simple geographical directions. Appellant is not allowed to leave either her parent's home or the Babcock Center home without permission and adult supervision.

While living at Babcock Center, Appellant worked at an animal shelter and a dump site sorting recyclable materials. Babcock Center personnel took her to and from work, where she was supervised by a job coach. Appellant's "lack of perspective and judgment is so limited that she needs help with every significant decision she makes about even the smallest matters that require assessment of consequences, potential danger, or comparing alternative courses of action," according to Brenda Bryant, Appellant's mother and court-appointed guardian.

On August 30, 1995, Appellant, then twenty-one years old, placed her luggage on the front porch of the Babcock Center home and went to bed fully clothed. After everyone was asleep, she secretly slipped out of the house sometime after 1 a.m. and left in a car with two men who either lived or recently had lived in a home managed by Babcock Center. Another

woman already was in the car. Appellant believed the four of them planned to go to an unknown location and set up housekeeping on their own. Instead, the other woman was taken home a short while later after an argument.

Appellant and the two men went to a house, where she had sex with one or both of them. Appellant initially told police and her mother she was raped, but testified at a deposition in this case she was "talked into having sex." Appellant returned to her Babcock Center home the following morning. Appellant alleges she was a virgin when she was admitted to the Babcock Center home. She contracted herpes simplex type I, a sexually transmitted disease, after one or more sexual encounters with men while staying at the Babcock Center home.

A probate court judge in 1997 issued an order appointing Appellant's mother as her guardian and conservator. The judge found Appellant was mentally retarded and lacked the capacity to exercise good judgment with regard to her person, assets, and financial affairs.

Appellant's amended complaint alleges causes of action for negligence, gross negligence, and willful indifference against Respondents. Appellant alleges, among other things, that both Babcock Center and Department owed a duty of care to Appellant, which they breached by failing to exercise sufficient control and supervision over Appellant and other Babcock Center residents. Appellant alleges both entities failed to properly supervise facility staff, both failed to heed the previous warnings of Appellant's mother about inappropriate sexual contacts between Appellant and current or former male residents of Babcock Center, and both ignored the requests of her parents that she be released from Babcock Center. Appellant's mother testified that, prior to August 30, 1995, she personally made repeated complaints about the sexual contacts to staff at the Babcock Center home where Appellant lived, Babcock Center director Risley Linder, and James Hill, Department's general counsel.

The circuit court granted summary judgment to Respondents. The judge ruled in two separate orders that, as a matter of law, Respondents "had no legal duty to maintain a constant watch over the plaintiff so as to

prevent her surreptitious elopement." Furthermore, the proximate cause of any damages suffered by Appellant, as a matter of law, was Appellant's "own voluntary and intentional acts."

Appellant appealed. We certified this case for review from the Court of Appeals pursuant to Rule 204(b), SCACR.

ISSUES

I. Did the circuit court err in granting summary judgment to Babcock Center on the ground it owes no legal duty of care to Appellant, a mentally retarded client voluntarily admitted to its care?

II. Did the circuit court err in granting summary judgment to Department on the ground it owes no legal duty of care to Appellant, a mentally retarded client voluntarily admitted to Babcock Center, a contractual provider of services?

III. Did the circuit court err in granting summary judgment to Respondents on the ground that, as a matter of law, the proximate cause of any injuries and damages suffered by Appellant were the result of her own voluntary and intentional acts?

IV. Did the circuit court err in ruling that certain allegations against Department are time-barred by the statute of limitations?

STANDARD OF REVIEW

A trial court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997). In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may

be drawn from the evidence in the light most favorable to the non-moving party. Manning v. Quinn, 294 S.C. 383, 365 S.E.2d 24 (1988). Summary judgment is a drastic remedy which should be cautiously invoked so that a litigant is not improperly deprived of a trial on disputed factual issues. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).

On appeal from an order granting summary judgment, the appellate court applies the same standard that governs the trial court. The appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the appellant, the non-moving party below. Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001); Williams v. Chesterfield Lumber Co., 267 S.C. 607, 230 S.E.2d 447 (1976).

In a case raising a novel question of law, the appellate court is free to decide the question with no particular deference to the lower court. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Const. art. V, §§ 5 and 9, S.C. Code Ann. § 14-3-320 and -330 (1976 & Supp. 2005), and S.C. Code Ann § 14-8-200 (Supp. 2005)); Osprey, Inc. v. Cabana Ltd. Partnership, 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000) (same); Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) (same).

DISCUSSION

I. DUTY OF CARE OWED BY BABCOCK CENTER

Appellant argues the circuit court erred in granting summary judgment to Babcock Center on the ground it owes no legal duty of care to Appellant, a mentally retarded client voluntarily admitted to the center's care. Babcock Center has a duty to exercise reasonable care in supervising and providing care and treatment to clients in its custody. We agree.

We conclude the circuit court erred in accepting Respondents' argument that Babcock Center either had a "twenty-four-hour, eyes-on" duty

of supervision – i.e., an extremely high and rigorous duty – or no duty at all. The circuit court in its order repeatedly described the purported duty as one of maintaining "constant watch" over Appellant. Appellant at the summary judgment hearing contended the duty was one of reasonable supervision, but the circuit court and Respondents appeared overly focused on the "high duty" versus "no duty" positions.

Respondents' position results in a distorted view of the center's duty because, first, it assumes an all-or-nothing approach with regard to the existence of a duty. Cf. Cunningham ex rel. Grice v. Helping Hands, Inc., 352 S.C. 485, 493, 575 S.E.2d 549, 553 (2003) (disagreeing with Court of Appeals' conclusion that children's shelter had an enhanced or specific duty to protect child at all times, instead reasoning that under circumstances presented shelter had only a general duty to supervise a child in its care; thus, the defense of assumption of risk was applicable as law then existed). Second, Respondents' position confuses the existence of a duty with standards of care establishing the extent and nature of the duty in a particular case, standards by which a fact finder may judge whether a duty was breached. Such standards are grounded in the common law, statutes, regulations, or policies and guidelines promulgated by Babcock Center or Department.

In a negligence action, a plaintiff must show that (1) the defendant owes a duty of care to the plaintiff, (2) the defendant breached the duty by a negligent act or omission, (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered an injury or damages. Steinke v. S.C. Dept. of Labor, Licensing and Regulation, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999); Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 238 S.E.2d 167 (1977). The court must determine, as a matter of law, whether the law recognizes a particular duty. If there is no duty, then the defendant in a negligence action is entitled to a judgment as a matter of law. Steinke 336 S.C. at 387, 520 S.E.2d at 149; Ellis v. Niles, 324 S.C. 223, 227, 479 S.E.2d 47, 49 (1996).

Under South Carolina common law, there is no general duty to control the conduct of another or to warn a third person or potential victim of

danger. We have recognized five exceptions to this rule: (1) where the defendant has a special relationship to the victim; (2) where the defendant has a special relationship to the injurer; (3) where the defendant voluntarily undertakes a duty; (4) where the defendant negligently or intentionally creates the risk; and (5) where a statute imposes a duty on the defendant. Faile v. S.C. Dept. of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002) (listing cases and authority supporting each proposition). An affirmative legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance. Jensen v. Anderson County Dept. of Soc. Servs., 304 S.C. 195, 199, 403 S.E.2d 615, 617 (1991); Miller v. City of Camden, 317 S.C. 28, 33-34, 451 S.E.2d 401, 404 (Ct. App. 1994). Moreover, it has long been the law that one who assumes to act, even though under no obligation to do so, thereby becomes obligated to act with due care. Sherer v. James, 290 S.C. 404, 406, 351 S.E.2d 148, 150 (1986); Roundtree Villas Assn. v. 4701 Kings Corp., 282 S.C. 415, 423, 321 S.E.2d 46, 50-51 (1984); Miller, 317 S.C. at 33-34, 451 S.E.2d at 404.

"One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking." Restatement (Second) of Torts § 323 (1965). In addition, "[o]ne who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge, or (b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him." Restatement (Second) of Torts § 324 (1965).

The present case falls within the first, third, fourth, and fifth exceptions specified in Faile, as well as within the circumstances outlined in Restatement (Second) of Torts §§ 323-324.

Babcock Center had a special relationship with Appellant because she was a client with special needs and disabilities admitted for care and treatment at the center. Babcock Center voluntarily undertook the duty of supervising and caring for Appellant as provided in its contractual relationship with Department. Babcock Center allegedly acted negligently in creating the risk of injury to Appellant by not properly supervising her and allowing improper sexual contacts between Appellant and men. Furthermore, the center had a statutory duty to exercise reasonable care in supervising Appellant. See e.g. S.C. Code Ann. § 44-20-30(2), (11), and (17) (2002) (defining client, mental retardation, and residential programs); S.C. Code Ann. § 44-20-710 to -1000 (2002) (addressing licensing of facilities and programs for mentally disabled persons); S.C. Code Ann. § 44-26-10 to -220 (2002) (rights of mental retardation clients).[3] In short, Babcock Center undertook a duty, for consideration, to render services to Appellant which the center should have recognized as necessary for the protection of Appellant. Thus, Babcock Center had a duty to control Appellant's conduct to the extent necessary to prevent her from harming herself or to prevent others from harming her while staying at the center.

The fact Appellant was a voluntary admittee is irrelevant in deciding whether she is owed a duty of care. As long as Appellant was living as a client at a Babcock Center home – whether voluntarily or involuntarily – Babcock Center owed a duty of care to her. See e.g. S.C. Code Ann. § 44-20-460 (2002) ("person admitted or committed to the services of the

[3] Neither the record nor the briefs contain a thorough review or assessment of various statutes and regulations pertaining to the care of mentally disabled or retarded persons. Given the posture of this case and our primary conclusion that a duty exists under the common law to exercise reasonable care in supervising and providing care to such persons, we have not attempted to fully ascertain the impact of various statutes or regulations, or identify all statutes and regulations which may be relevant in establishing a duty or defining the appropriate standard of care. Such issues may be explored by the parties and court on remand of this case.

department remains a client and is eligible for services until discharged"); cf. Kolpak v. Bell, 619 F. Supp. 359, 377-79 (D. Ill. 1985) (finding much logic in cases that find voluntary and involuntary residents are entitled to the same constitutional rights to a safe environment in actions brought under 42 U.S.C. § 1983, and listing cases). "These cases recognize that for all practical purposes, many of the residents of state-run mental institutions are effectively admitted involuntarily: they may have been admitted upon the unilateral application of their parents or guardians; they may be incapable of expressing a desire to enter or to leave; they may be involuntarily committed when they apply for discharge; or their financial circumstances may be such that admission, voluntary or involuntary, is a foregone conclusion." Id. at 378-79.

Accordingly, we hold that, under the common law, a private person or business entity which accepts the responsibility of providing care, treatment, or services to a mentally retarded or disabled client has a duty to exercise reasonable care in supervising the client and providing appropriate care and treatment to the client. See Lee v. Dept. of Health and Rehabilitative Servs., 698 So.2d 1194, 1199 (Fla. 1997) (mentally retarded woman who became pregnant while in custody of state agency stated cause of action for negligence against agency employees who allegedly failed to follow agency's rules and carry out their assigned duties in supervising patients); Butler v. Circulus, Inc., 557 S.W.2d 469, 475 (Mo. App. 1977) (mentally retarded minor plaintiff who was resident and student at defendant's licensed institution stated cause of action for negligence against defendant for failing to supervise employees who allegedly physically and mentally abused plaintiff as part of a behavior modification program); Restatement (Second) of Torts §§ 323-324; cf. Rogers v. S.C. Dept. of Parole & Comm. Corrections, 320 S.C. 253, 464 S.E.2d 330 (1995) (holding that common law duty to warn arises when a person being released from custody has made a specific threat of harm directed at a specific individual); Youngberg v. Romeo, 457 U.S. 307, 319, 102 S.Ct. 2452, 2460, 73 L.Ed.2d 28 (1982) (under substantive component of Fourteenth Amendment's Due Process Clause, state must provide involuntarily committed mental patients with services necessary to ensure their reasonable safety from themselves and others, as well as freedom from undue restraint); DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 201-02, 109 S.Ct. 998, 1006, 103

L.Ed.2d 249 (1989) (while substantive component of Fourteenth Amendment's Due Process Clause did not protect child beaten to death by his father after state agency failed to remove child from home, "it may well be that, by voluntarily undertaking to protect Joshua against a danger it concededly played no part in creating, the State acquired a duty under state tort law to provide him with adequate protection against that danger").[4]

We further hold that, if Appellant proves at trial she has the limited emotional and intellectual capacity she has demonstrated at the summary judgment stage, Appellant should be treated as the equivalent of a willful, immature child who really has no idea of what is best for her in determining whether Babcock Center breached the duty of care owed to her. "Children, wherever they go, must be expected to act upon childish instincts and impulses; and others, who are chargeable with a duty of care and caution towards them must calculate upon this and take precautions accordingly." Franks v. Southern Cotton Oil Co., 78 S.C. 10, 18, 58 S.E. 960, 962 (1907).

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[4] The mother of the mentally retarded adult male in Youngberg alleged violations of her son's constitutional rights pursuant to 42 U.S.C. § 1983. While Section 1983 cases may shed light generally on the rights of mentally retarded or disabled persons and the responsibilities of their caregivers, such cases are controlled by different standards than tort cases sounding in common law negligence. See e.g. Kyle K. v. Chapman, 208 F.3d 940 (11th Cir. 2000) (addressing § 1983 lawsuit brought pursuant to Youngberg by parents of mentally retarded child who allegedly was physically and mentally abused by various mental health professionals, administrators, and direct care personnel at state mental hospital); White by White v. Chambliss, 112 F.3d 731 (4th Cir. 1997) (addressing § 1983 lawsuit brought in connection with death of child in foster home and discussing different standards at issue in negligence and § 1983 actions); Fialkowski v. Greenwich Home for Children, Inc., 921 F.2d 459 (3d Cir. 1990) (nonprofit organization which performed mental health intake and referral services for county may have acted negligently in failing to recommend feeding restrictions for profoundly retarded adult male with eating disorder, but organization did not violate victim's Fourteenth Amendment due process rights).

In Standard v. Shine, 278 S.C. 337, 295 S.E.2d 786 (1982), we abandoned age-based presumptions previously used in assessing whether an injured child's own negligence contributed to his injury. "The capacities of children vary greatly, not only with age, but also with individuals of the same age. Therefore, no very definite statement can be made to just what standard is to be applied to them. . . . Of course, a child of tender years is not required to conform to an adult standard of care. . . . [A] minor's conduct should be judged by the standard of behavior to be expected of a child of like age, intelligence, and experience under like circumstances." Id. at 339, 295 S.E.2d at 787; accord Jones ex rel. Castor v. Carter, 336 S.C. 110, 117, 518 S.E.2d 619, 622 (Ct. App. 1999); Brown v. Smalls, 325 S.C. 547, 556, 481 S.E.2d 444, 449 (Ct. App. 1997). Similarly, the conduct of a mentally retarded or disabled client of a residential home training program should be judged by the behavior to be expected of a person of like age, intelligence, and experience under like circumstances.

The factfinder may consider relevant standards of care from various sources in determining whether a defendant breached a duty owed to an injured person in a negligence case. The standard of care in a given case may be established and defined by the common law, statutes, administrative regulations, industry standards, or a defendant's own policies and guidelines. See e.g. Steinke v. S.C. Dept. of Labor, Licensing & Regulation, 336 S.C. 373, 387-89, 520 S.E.2d 142, 149-50 (1999) (affirmative legal duty may be created by statute which establishes the standard of care); Clifford v. Southern Ry. Co., 87 S.C. 324, 69 S.E. 513 (1910) (statute may create special duty of care and breach of that statute may constitute negligence per se); Peterson v. Natl. R.R. Passenger Corp., 365 S.C. 391, 397, 618 S.E.2d 903, 906 (2005) (although federal regulations provided standard of care, internal policies of company which owned the line of track and railroad which owned the train were not preempted by federal law, and company's and railroad's deviation from own internal policies was admissible as evidence they deviated from standard of care, thus breaching duty owed to plaintiff, in lawsuit brought by plaintiff injured in train derailment); Elledge v. Richland/Lexington School Dist. Five, 352 S.C. 179, 186, 573 S.E.2d 789, 793 (2002) (general rule is that evidence of industry safety standards is

relevant to establishing the standard of care in a negligence case); Tidwell v. Columbia Ry., Gas & Elec. Co., 109 S.C. 34, 95 S.E. 109 (1918) (relevant rules of a defendant are admissible in evidence in a personal injury action regardless of whether rules were intended primarily for employee guidance, public safety, or both, because violation of such rules may constitute evidence of a breach of the duty of care and the proximate cause of injury); Caldwell v. K-Mart Corp., 306 S.C. 27, 31-32, 410 S.E.2d 21, 24 (Ct. App. 1991) (when defendant adopts internal policies or self-imposed rules and thereafter violates those policies or rules, jury may consider such violations as evidence of negligence if they proximately caused a plaintiff's damages); Steeves v. U.S., 294 F. Supp. 446, 455 (D.S.C. 1968) (violation of a rule or regulation which is designed primarily for the safety of hospital patients will constitute negligence if the violation proximately results in the injury); Restatement (Second) of Torts § 285 (1965) (standards of conduct of reasonable man may be established by statute, regulation, court's interpretation of statute or regulation, judicial decision, or as determined by trial judge or jury under facts of a case).

Appellant cites federal Medicaid or Medicare regulations in her complaint, and both Appellant and Babcock Center mention various statutes, regulations, and program guidelines in their briefs. We express no opinion on particular standards of care which may be relevant and properly applied in this case. The identification of sources establishing the standard of care with regard to Appellant will be an issue for the parties and court on remand of this case.

In sum, we find the existence of a common law duty owed by Babcock Center to Appellant. The precise extent and nature of that duty, which is grounded in relevant standards of care, and whether the duty was breached must be determined by a jury on remand.

II. DUTY OF CARE OWED BY DEPARTMENT

Appellant argues the circuit court erred in granting summary judgment to Department on the ground it owes no legal duty of care to Appellant. Appellant asserts Department and the direct provider of services,

independent contractor Babcock Center, both owe a duty to exercise reasonable care with regard to Appellant. Appellant asserts Department's duty of care is grounded in both the common law and in various statutes and regulations pertaining to Department. We agree Department owes a common law duty, but decline to address the issue of Department's statutory duty.

A. DEPARTMENT'S DUTY UNDER THE COMMON LAW

As explained above, under the common law, a private person or business entity which accepts the responsibility of providing care, treatment, or services to a mentally retarded or disabled client has a duty to exercise reasonable care in supervising the client and providing appropriate care and treatment to the client. Thus, to the extent Appellant relies on this common law duty, summary judgment was wrongly granted to Department. See Arthurs ex rel. Estate of Munn v. Aiken County, 346 S.C. 97, 103-105, 551 S.E.2d 579, 582-83 (2001) (public duty rule is applied only when an action is founded upon a statutory duty; when duty is based on common law, then its existence is analyzed as it would be with a private defendant which is not a government entity pursuant to Tort Claims Act); Trousdell v. Cannon, 351 S.C. 636, 641, 572 S.E.2d 264, 266-67 (2002) (same); Morris v. Anderson, 349 S.C. 607, 611-12, 564 S.E.2d 649, 651-52 (2002) (same); S.C. Code Ann. § 15-78-40 (2005) (governmental entity is liable for its torts "in the same manner and to the same extent as a private individual under like circumstances," subject to limitations upon and exemptions from liability and damages contained in Tort Claims Act).

When a governmental entity owes a duty of care to a plaintiff under the common law and other elements of negligence are shown, the next step is to analyze the applicability of exceptions to the waiver of immunity contained in S.C. Code Ann. § 15-78-60 (2005 & Supp. 2005) which are asserted by the governmental entity. Arthurs, 346 S.C. at 105, 551 S.E.2d at 583; Trousdell, 351 S.C. at 642, 572 S.E.2d at 267. The governmental entity claiming an exception to the waiver of immunity under the Tort Claims Act has the burden of establishing any limitation on liability. Strange v. S.C. Dept. of Highways & Pub. Transp., 314 S.C. 427, 430, 445 S.E.2d 439, 440 (1994).

Department asserts it is not liable for the torts of its independent contractor, Babcock Center, pursuant to S.C. Code Ann. § 15-78-60(20) (2005), which provides that a governmental entity is not liable for an "act or omission of a person other than an employee including but not limited to the criminal actions of third persons." Department also has asserted and the circuit court relied on S.C. Code Ann. § 15-78-30(c) (2005), which provides that the term "employee" "does not include an independent contractor doing business with the State."

We find this position unpersuasive because Department owes a common law duty of care directly to Appellant. The fact an independent contractor provided services to Appellant or the fact a third party may have committed a criminal act in harming Appellant does not affect the existence of Department's duty. If both Department and Babcock Center independently owe a duty of care to Appellant – even if Department's primary role is ensuring that its contractors manage and operate programs properly and provide appropriate care to clients – either may be held liable for negligence without regard to the other. A jury could find both Department and Babcock Center breached a duty of care owed to Appellant, a jury could find neither breached its duty, or a jury could find one more liable than the other under a comparative negligence analysis. Again, we express no opinion on the precise standard of care owed by Department in this instance, which may be explored by the parties and court on remand of this case.

Next, Department asserts it is immune from liability under S.C. Code Ann. § 15-78-60(4) (2005), which provides that a governmental entity is not liable from "adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies." This argument was neither presented to nor ruled on by the circuit court; therefore, it is not preserved for appellate review. E.g. Smith v. Phillips, 318 S.C. 453, 458 S.E.2d 427 (1995) (with very limited exceptions, appellate court may not address an issue unless the issue was raised to and ruled on by the trial court).

The circuit court also relied on S.C. Code Ann. § 15-78-60(25) (2005). This subsection provides that a governmental entity is not liable from "responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner."

"Gross negligence is ordinarily a mixed question of law and fact." Faile, 350 S.C. at 332, 566 S.E.2d at 545 (citing Clyburn v. Sumter County School Dist. #17, 317 S.C. 50, 451 S.E.2d 885 (1994)). "When the evidence supports but one reasonable inference, it is solely a question of law for the court, otherwise it is an issue best resolved by the jury. . . . In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury." Id. at 332, 566 S.E.2d at 545. We conclude that the issue of whether Department acted in a grossly negligent manner is a factual issue for a jury.

In sum, we hold that Department has a common law duty to exercise reasonable care in supervising and providing appropriate care and treatment to a mentally retarded or disabled client.

B. DEPARTMENT'S STATUTORY DUTY AND IMPACT OF PUBLIC DUTY RULE

In Arthurs, we explained that

> [t]he public duty rule presumes statutes which create or define the duties of a public office have the essential purpose of providing for the structure and operation of government or for securing the general welfare and safety of the public. Such statutes create no duty of care towards individual members of the general public. . . . The public duty rule is a negative defense which denies an essential element of the plaintiff's cause of action: the existence of a duty of care to the individual plaintiff. . . . It is not a matter of immunity, which is an affirmative defense that must be

> pleaded and which may be waived. Further, it is a rule of statutory construction, that is, a means of determining whether the legislative body that enacted the statute or ordinance intended to create a private cause of action for its breach. . . .
>
> The public duty rule insulates public officials, employees, and governmental entities from liability for the negligent performance of their official duties by negating the existence of a duty towards the plaintiff.

Arthurs, 346 S.C. at 104, 551 S.E.2d at 582 (citations and quotes omitted).

We retained the public duty rule, finding it compatible with the Tort Claims Act. However, the rule is applied only when an action is founded upon a statutory duty, not when the duty is grounded in the common law. Arthurs, 346 S.C. at 103-05, 551 S.E.2d at 582-83,

> As explained in Arthurs,
>
> [a]n exception to the general rule exists when the statutory duty is owed to individuals rather than to the public at large. Our courts are reluctant to find a special duty. . . . [T]his Court [has] adopted a six part test developed by the Court of Appeals . . . for determining when such a "special duty" exists:
>
> > (1) an essential purpose of the statute is to protect against a particular type of harm;
> > (2) the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not cause that harm;
> > (3) the class of persons the statute intends to protect is identifiable before the fact;
> > (4) the plaintiff is a person within the protected class;
> > (5) the public officer knows or has reason to know the likelihood of harm to members of the class if he fails to do his duty; and

> (6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office.

Arthurs, 346 S.C. at 106, 551 S.E.2d at 583; accord Steinke, 336 S.C. at 388-89, 520 S.E.2d at 149-50; Jensen, 304 S.C. at 200, 403 S.E.2d at 617.

In the present case, Department's operations and responsibilities, as well as the care, treatment, and rights of mentally retarded or disabled persons, are governed by a comprehensive scheme of statutes and regulations. See e.g. S.C. Code Ann. §§ 44-20-10 to -1170 (2002 & Supp. 2005) (S.C. Mental Retardation, Related Disabilities, Head Injuries, and Spinal Cord Injuries Act); S.C. Code Ann. §§ 44-21-10 to -80 (2002) (Department of Disabilities and Special Needs Family Support Services); S.C. Code Ann. §§ 44-23-10 to -1150 (2002 & Supp. 2005) (provisions applicable to both mentally ill and mentally retarded persons); S.C. Code Ann. §§ 44-26-10 to -220 (2002) (rights of mental retardation clients); and 26 S.C. Code Ann. Regs. 88-105 to 88-920 (Supp. 2005) (regulations promulgated by Department of Disabilities and Special Needs). Department's operations and responsibilities also are affected by internal standards, policies, and guidelines it has promulgated for particular programs as a result of statutes or regulations.[5]

We express no opinion on the issues of whether Department owes a duty grounded in statutes or regulations, or whether Department owes a special duty to Appellant under the analysis of the public duty rule set forth in Arthurs, Steinke, and Jensen. The parties have not addressed these issues, which may be explored on remand of this case.

[5] See footnote 3.

III. PROXIMATE CAUSE

Appellant contends the circuit court erred in ruling that the proximate cause of any damages suffered by Appellant, as a matter of law, was Appellant's own voluntary and intentional acts. We agree.

Negligence is not actionable unless it is a proximate cause of the injury. Hanselmann v. McCardle, 275 S.C. 46, 48, 267 S.E.2d 531, 533 (1980). Proximate cause requires proof of both causation in fact and legal cause. Oliver v. S.C. Dept. of Highways and Pub. Transp., 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992). Causation in fact is proved by establishing the injury would not have occurred "but for" the defendant's negligence. Legal cause is proved by establishing foreseeability. Id.; Koester v. Carolina Rental Ctr., Inc., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). Foreseeability is determined by looking to the natural and probable consequences of the complained of act, although it is not necessary to prove that a particular event or injury was foreseeable. Koester, 313 S.C. at 493, 443 S.E.2d at 394; Oliver, 309 S.C. at 317, 422 S.E.2d at 131; Childers v. Gas Lines, Inc., 248 S.C. 316, 325, 149 S.E.2d 761, 765 (1966).

The defendant's negligence does not have to be the sole proximate cause of the plaintiff's injury; instead, the plaintiff must prove the defendant's negligence was at least one of the proximate causes of the injury. Hughes v. Children's Clinic, P.A., 269 S.C. 389, 398, 237 S.E.2d 753, 757 (1977). The question of proximate cause ordinarily is one of fact for the jury, and it may be resolved either by direct or circumstantial evidence. The trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence. Childers, 248 S.C. at 324, 149 S.E.2d at 765; McNair v. Rainsford, 330 S.C. 332, 349, 499 S.E.2d 488, 497 (Ct. App. 1998).

We hold that the issue of whether Appellant's injuries were proximately caused by the alleged negligence of Respondents is an issue of fact for the jury. The jury must determine whether Appellant's damages would have occurred "but for" Respondents' alleged negligence, as well as

whether such damages were foreseeable, i.e., whether the damages were the natural and probable consequence of a failure to exercise reasonable care in supervising and providing care and treatment to Appellant. The jury may perform its task after gaining a proper understanding of the facts and circumstances of Appellant's case, as well as the applicable standards of care.

We further agree with Appellant that the circuit court erred in reasoning she was competent to make her own decisions – such as leaving the Babcock Center home – because she was not adjudicated incompetent to handle her personal and financial affairs until some two years after the events of August 1995. The circuit court relied on S.C. Code Ann. § 44-26-90 (2002), which provides that unless a client has been adjudicated incompetent, she must not be denied the right to, among other things, execute instruments, enter into contractual relationships, and exercise rights of citizenship in the same manner as a non-disabled person.

Appellant alleges she has the emotional and intellectual capacity of a young child. Her actions and the alleged negligence of Respondents must be assessed in light of her mental abilities and the standards governing Respondents' duty of care. Appellant's competence and ability to handle her own affairs, or the lack thereof, is a factual issue related to proximate cause which must be resolved by a jury.[6] The circuit court erred in granting summary judgment to Respondents on the ground of proximate cause.

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[6] Babcock Center contends Appellant is arguing she was not competent to testify due to her mental retardation, i.e., Babcock Center focuses on Appellant's competency to testify as opposed to her competency to make her own decisions. The circuit court focused on Appellant's competency to act on her own, not her competency to testify. As far as competency to testify, Appellant should be treated as a person of like age, intelligence, and experience. Cf. State v. Green, 267 S.C. 599, 603, 230 S.E.2d 618, 619 (1976) (there is no fixed age which an individual must attain in order to be competent to testify as a witness); S.C. Dept. of Soc. Servs. v. Doe, 292 S.C. 211, 219, 355 S.E.2d 543, 547 (Ct. App. 1987) (child's competency to testify depends on showing to the satisfaction of the trial judge that child is

continued . . .

IV. STATUTE OF LIMITATIONS

Appellant argues the circuit court erred in relying on the two-year statute of limitations contained in S.C. Code Ann. § 15-78-100(a) (2005) to rule that certain allegations of Department's negligence are time-barred. Appellant does not raise this issue in her Statement of Issues, but she does challenge the ruling in her brief. Given our remand of this case, we will address this issue to avoid future debate and confusion about it.

While the circuit court order is rather vague on this point, Department argued at the summary judgment hearing that allegations relating to the initial evaluation and admission of Appellant in 1994 were time-barred. Department apparently believes that only events occurring within the two years preceding the service of the complaint (i.e., 1995-97) may be considered, but cites no authority for this proposition. We disagree.

The events in question occurred August 30, 1995. Appellant served her initial complaint on Department on August 29, 1997, meeting the two-year deadline. Accordingly, allegations relating to Department's alleged negligence in connection with Appellant's initial evaluation and admission in 1994 are not time-barred.

CONCLUSION

We reverse the circuit court and hold that Babcock Center and its employee have a common law duty to exercise reasonable care in supervising and providing care and treatment to Appellant, a mentally retarded client with disabilities and special needs. Department also owes a common law duty to Appellant and statutory exceptions to the waiver of immunity which Department asserts are inapplicable. We decline to reach the issues of

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substantially rational and responsive to the questions asked and is sufficiently aware of the moral duty to tell the truth and the probability of punishment if he lies).

whether Department owes a statutory duty or the impact of the public duty rule. We decline to identify particular sources or standards of care which may be relevant in defining the nature and extent of Respondents' duty under the common law or statutes, as well as whether they breached their duty. Such issues may be explored by the parties and court on remand of this case. We hold that whether the breach of a duty proximately caused Appellant's injuries is a question of fact for the jury. Finally, we hold that allegations relating to Department's alleged negligence in connection with Appellant's initial evaluation and admission are not time-barred.

REVERSED.

TOAL, C.J., MOORE, and WALLER, JJ., concur. PLEICONES, J., concurring in a separate opinion.

JUSTICE PLEICONES: I concur in the result reached by the majority because I agree that Babcock Center owed a common law duty of due care to Appellant. I write separately because I do not agree with that portion of the majority opinion that finds a duty based upon statute. In my opinion, the source of the duty owed to Appellant is not found in or created by any statute. Rather, as indicated in footnote 3 of the majority opinion, some of the statutes cited in the opinion "may be relevant in ... defining the appropriate standard of care."

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Kenneth E. Sowell, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenwood County
Wyatt T. Saunders, Jr, Circuit Court Judge

Opinion No. 26199
Heard May 3, 2006 – Filed August 14, 2006

REVERSED

Kenneth E. Sowell, of Anderson, pro se.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and State Grand Jury Chief Jennifer D. Evans, all of Columbia, for Respondent.

JUSTICE WALLER: We granted a writ of certiorari to review the Court of Appeals' opinion in State v. Sowell, Op. No. 2005-UP-122 (Ct. App. filed Feb. 17, 2005). The Court of Appeals affirmed the circuit court's holding that Sowell was in contempt for releasing grand jury information to his private investigator. We reverse.

FACTS

Sowell is an attorney who was hired to represent Bobby Joe Lewis, a criminal defendant who was indicted by the State Grand Jury for trafficking methamphetamine. On March 4, 2002, the circuit court issued a protective order pursuant to S.C. Code Ann. § 14-7-1720 (Supp. 2004), directing that any State Grand Jury material given to the defendants was being provided only for purposes of their trials, and that their attorneys were bound by the secrecy provisions of § 14-7-1720.[1]

Sowell hired a private investigator, Gene Gore, to look into the charges and to investigate how other witnesses would testify. According to Sowell, he had utilized Gore, who also worked as a used car salesman, numerous times in the past as a private investigator. Gore testified that he understood that he was acting as Sowell's agent, or a paralegal, while conducting his investigations.

Sowell gave Gore the Grand Jury file information forwarded to him from the Attorney General's office. At Sowell's contempt trial, the assistant solicitor questioned Gore as to whether, when Sowell left this information with him, "did he give you any instructions about what to do or anything about grand jury material, anything like that?" Gore responded negatively. However, when questioned by Sowell as to whether he was warned by Sowell not to discuss the contents of the file with anyone, Gore responded:

> A. The best I can recall, you handed me that box and you said, "These are statements that have been taken from the people in this case. I want you to look through them and go investigate the ones you feel are pertinent to the upcoming case.
> Q. And what did I tell you about disclosing the information from that file?
> A. No, you told me to keep the box under lock and key at all times.

[1] The order does not prohibit the defendants or their attorneys from using Brady material for purposes of preparing for trial. Brady v. Maryland, 373 U.S. 83 (1963).

Sowell also testified he instructed Gore not to disclose the contents of the file or show it to anyone.

Lewis' first trafficking trial, in April 2002, ended in a hung jury. During that trial, it became evident the state had information that a man named Floyd Eugene Ballew, Jr., a/k/a Dooney, was supplying drugs to Lewis. It also became evident at the first trial that Lewis and Dooney's supplier was a man named "Kenny," or "KC," from Greenville. Subsequent to the first trial, Dooney was added to the indictment as a co-conspirator in the trafficking ring. Dooney was arrested and, prior to Lewis' second trial, Sowell met with him in the Laurens County jail and took an affidavit and statement from him. From his meeting with Dooney, Sowell concluded Kenneth Curtis was the "Kenny" or "KC" implicated in the first trial. Sowell therefore instructed Gore to talk to Curtis and ascertain the substance of his testimony if called as a witness at the second trial.

Kenneth Curtis was called as a witness by the state at the contempt hearing. Curtis testified that he had paid Lewis' attorney fee to Sowell, and that Sowell allegedly advised Curtis he would let him know if Lewis was "going to flip on him." Curtis testified he was kept advised of the on-going investigation by Gore. On cross-exam by Sowell, however, Curtis testified that he was never told about the contents of the Grand Jury file by Gore. Gore simply advised Curtis that his name was "all over the place" and that police were about to get him.

At the conclusion of the contempt hearing, the state asserted that the only basis upon which it was seeking a finding of contempt was that Sowell had released the Grand Jury file to Gore; the state specifically advised the court it was not alleging a contempt violation based upon any disclosure by Gore to Curtis.

The circuit court found Sowell in criminal contempt of the March 4, 2002 protective order, holding that he was not authorized to release the Grand Jury information to Gore, and that he had not explained the secrecy requirements of the protective order to Gore.

The Court of Appeals affirmed the contempt finding. It found Sowell had failed to inform the court that he had disclosed the Grand Jury information to Gore, and had failed to explain to Gore the obligation of secrecy.

ISSUE

Did the Court of Appeals err in affirming the finding of contempt?

DISCUSSION

Willful disobedience of an Order of the Court may result in contempt. Spartanburg County Dep't of Social Svcs. v. Padgett, 296 S.C. 79, 370 S.E.2d 872 (1988). A willful act is defined as one "done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law." Id. at 82-83, 370 S.E.2d at 874, citing Black's Law Dictionary 1434 (5th Ed. 1979). However, "[o]ne may not be convicted of contempt for violating a court order which fails to tell him in definite terms what he must do." Welchel v. Boyter, 260 S.C. 418, 421, 196 S.E.2d 496, 498 (1973). In order to sustain a finding of contempt, the record must be clear and specific as to the acts or conduct upon which such finding is based. Curlee v. Howle, 277 S.C. 377, 287 S.E.2d 915, 918 (1982). In a criminal contempt proceeding, the state has the burden of proving the guilt of the defendant beyond a reasonable doubt. State v. Bowers, 270 S.C. 124, 131, 241 S.E.2d 409, 412 (1978). A determination of contempt is within the sound discretion of the trial judge, but is subject to reversal where based on a finding that is without evidentiary support or where there has been an abuse of discretion. Pratt v. S.C. Dep't of Social Svcs., 283 S.C. 550, 324 S.E.2d 97 (Ct.App.1984).

Here, the trial court's protective order states, in pertinent part:

> IT IS HEREBY ORDERED that the Attorney General is protected if he chooses to disclose to the attorneys for the

> defendants in the above-captioned cases testimony taken in the State Grand Jury and interviews of witnesses and other documents which must subsequently be disclosed under normal circumstances at trial. It is understood that the State Grand Jury material is being provided only for purposes of the trial of the above-captioned cases. The attorney for the defendants and the defendants are bound by the secrecy provisions of § 14-7-1720.
>
> IT IS FURTHER ORDERED that, pursuant to S.C. Code Ann. §§ 14-7-1700 and –1720(A) (Law. Co-op. 1976), the defendants and their attorneys are prohibited from photocopying any State Grand Jury testimony, interviews of witnesses and any other documents that may be disclosed to the defendants and their attorneys in reference to the above-captioned case. All such materials shall be completely destroyed at the conclusion of the case.
>
> Nothing in this Order prohibits the defendants or their attorneys from using Brady material for purposes of preparing for trial.

Pursuant to S.C. Code Ann. §14-7-1700, a defendant has the right to review and reproduce grand jury materials. This section also requires the Attorney General, subject to the limitations of S.C. Code Ann. § 14-7-1720 (A) and (D), to provide the defendant a copy of the transcript of the recorded testimony or proceedings. Subsection 14-7-1720 (A) provides, in pertinent part, as follows:

> A state grand juror, the Attorney General or his designee, any interpreter used, the court reporter, and any person to whom disclosure is made pursuant to subsection (B) (2) of this section may not disclose the testimony of a witness examined before a state grand jury or other evidence received by it except when directed by a court for [certain purposes]. . .

Subsection (B) (2) provides:

> (B) In addition, disclosure of testimony of a witness examined before a state grand jury or other evidence received by it may be made without being directed by a court to:
>
> (1) the Attorney General or his designee for use in the performance of their duties; and
>
> (2) those governmental personnel, including personnel of the State or its political subdivisions, as are considered necessary by the Attorney General or his designee to assist in the performance of their duties to enforce the criminal laws of the State; provided that any person to whom matters are disclosed under this item (2) shall not utilize that state grand jury material for purposes other than assisting the Attorney General or his designee in the performance of their duties to enforce the criminal laws of the State. The Attorney General or his designee promptly shall provide the presiding judge before whom was impaneled the state grand jury whose material has been disclosed, the names of the persons to whom the disclosure has been made, and shall certify that he has advised these persons of their obligation of secrecy under this section.

By its terms, subsection A applies only to the Attorney General or his designees, or to those whom disclosure is made pursuant to Subsection B. Subsection B is inapplicable here, as it likewise pertains to the Attorney General, and governmental personnel acting in the performance of their duties. We find no basis to hold Sowell in criminal contempt for willful violation of a statute which, on its face, does not apply to him. Welchel v. Boyter (party may not be convicted of contempt for violating a court order which fails to tell him in definite terms what he must do).

The Court of Appeals affirmed the finding of contempt based in part upon the emphasized language of § 14-7-1720(B) (2), requiring the Attorney General or his designee to give notice to the circuit court if grand jury information was disclosed. The Court of Appeals cited the mandatory language of section 14-7-1720(B) (2), as follows:

> The Attorney General or his designee promptly shall provide the presiding judge before whom was impaneled the state grand jury whose material has been disclosed, the names of the persons to whom the disclosure has been made, and shall certify that he has advised these persons of their obligation of secrecy under this section.

The Court of Appeals went on to note there was evidence to support the trial court's rulings inasmuch as Sowell failed to inform the court that he disclosed the grand jury material to Gore. However, Sowell's failure to advise the trial court of disclosure was not the basis of the trial court's finding of contempt. Accordingly, the Court of Appeals erred in utilizing this as a basis for affirming the contempt finding. Connolly v. People's Life Ins. Co. of South Carolina, 299 S.C. 348, 384 S.E.2d 738 (1989) (Court of Appeals may not decide an issue neither raised to nor ruled upon by the trial judge).

Further, the Court of Appeals affirmed the contempt finding based on the fact that Curtis testified he was kept apprised by Gore of materials which pertained to him. However, the State specifically maintained at the contempt hearing that it was not seeking a contempt violation for Gore's disclosure to a third party but, rather, due solely to Sowell's disclosure to Gore. The Court of Appeals erred in utilizing this ground to affirm the contempt finding. Connolly v. People's Life.

Further, subsection 14-7-1720 (B)(2) authorizes the designee of the Attorney General to disclose as he deems necessary to assist personnel in the performance of their duties to enforce the criminal laws. This section, if applied to Sowell, would authorize Sowell's disclosure to necessary personnel (i.e. Gore) to aid him in his duties. Accordingly, Sowell may not be held in willful contempt for disseminating information for which 14-7-1720 (B) (2) authorizes disclosure.

Lastly, the trial court held that "Gore stated in his testimony that he was not given any instruction regarding the release of this information to any

other individuals [from Sowell]." As Sowell points out, however, this is not what Gore testified. Gore was asked by the prosecution, "When Mr. Sowell left this information with you, did he give you any instructions about what to do or anything about grand jury material, anything like that?" Gore responded, "No, ma'am." However, Gore later testified that "The best I can recall, you handed me that box and you said, 'These are statements that have been taken from the people in this case. I want you to look through them and go investigate the ones you feel are pertinent to the upcoming case." The query went on, "And what did I tell you about disclosing the information from that file?" [Answer] "No, you told me to keep the box under lock and key at all times."

Sowell subsequently testified that before he gave the information to Gore, he had instructed him not to disclose the contents to anyone. We find that, to the extent the trial court held Sowell had released the information to Gore without advising him not to further disseminate it, its findings are not supported by the evidence. Pratt v. S.C. Dep't of Social Svcs. (contempt finding is subject to reversal where based on a finding that is without evidentiary support).

CONCLUSION

Given that S.C. Code Ann. § 14-7-1720 is, by its terms, inapplicable to Sowell, we find that the protective order fails to sufficiently advise him of what he must do. Accordingly, the finding of contempt is reversed.

REVERSED.[2]

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[2] The dissent concludes Sowell was properly held in contempt pursuant to S.C. Code Ann. §§ 14-7-1700 and 14-7-1720 **(A)**. Section 14-7-1700 requires disclosure of grand jury proceedings to the defendant "subject to the limitations of Section 14-7-1720(A) and (D)." The portion of § 14-7-1720 (A) cited by the dissent applies to state grand jurors themselves stating, "state grand jury proceedings are secret, and a state grand juror shall not disclose the nature or substance of the deliberations or vote of the state grand jury." The only portion of § 14-7-1720 (A) which could conceivably apply here states, "a state grand juror, the Attorney General or his designee, any interpreter used, the court reporter, and **any person to whom disclosure is made pursuant to subsection (B)(2) of this section may not disclose the testimony of a witness examined before a state grand jury or other evidence received by it except when directed by a court.**"

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

Accordingly, this section requires a court order directing disclosure only if the disclosure was initially made pursuant to subsection (B)(2).

Moreover, the position advanced by the dissent would expose criminal defense attorneys who disclose grand jury materials to their office personnel for trial, investigative or discovery purposes to a finding of criminal contempt absent a court order authorizing such disclosure.

CHIEF JUSTICE TOAL: I respectfully dissent. In my opinion, the majority mistakenly relies on S.C. Code Ann. § 14-7-1720(B)(2) (Supp. 2004) in overturning Sowell's contempt citation. The majority correctly states that subsection (B)(2) outlines specific duties of governmental personnel involved in enforcing the criminal laws of the State. However, the majority ignores the fact that the trial court's protective order directs that the parties to this action are also subject to the restrictions of S.C. Code Ann. § 14-7-1700. The Code provides that a criminal defendant is entitled to a copy of the transcript of the grand jury hearing "[s]ubject to the limitations of Section 14-7-1720(A) and (D) and Rule 5, South Carolina Rules of Criminal Procedure." S.C. Code Ann. § 14-7-1700 (Supp. 2004).

Accordingly, the language of § 14-7-1700 places *the same secrecy restrictions* upon the criminal defendant and his counsel that *the state grand jurors* are subject to via § 14-7-1720(A).[3] This limitation dictates that "[s]tate grand jury proceedings are secret, and a state grand juror shall not disclose the nature or substance of the deliberations . . . of the state grand jury." S.C. Code Ann. § 14-7-1720(A). Therefore, any disclosure under section (A) must be done under the direction of the Court.[4]

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[3] Under the majority's rationale, the language contained in § 14-7-1700 stating that "*subject to the limitations* of [s]ection 14-7-1720(A) and (D) . . . a defendant has the right to review. . . . materials" is meaningless. S.C. Code Ann. § 14-7-1700 (emphasis added).

[4] The majority correctly points out that a criminal defense attorney must make clear to whom disclosure can be made by asking the court for permission to disclose under § 14-7-1720(A). This would include a defense attorney's employees or office personnel. The grand jury proceedings are by their very nature secretive and designed to prevent the very thing that happened in the present case – i.e. disclosure to an unauthorized person who then takes that information and divulges it to a person under investigation by the grand jury. This result is not dictated by my position but rather by the very language contained in the statute. The majority's position would insulate an authorized person from penalty under the statute by allowing the authorized person to simply inform their employee of the grand jury's investigation and then leave it to chance whether that employee informs whomever he or she would like. In my opinion, the integrity of the grand jury proceedings can be compromised by engaging a lawyer's office in a game of "whisper down the line." It is not overly burdensome to get the court's permission for a specific disclosure, and obtaining such disclosure permission protects the lawyer from unauthorized down the line disclosure.

The portion of the statute relied upon by the majority, § 14-7-1720 (B)(2) governs those occasions when disclosure can be made without leave of the court. As correctly pointed out, this section is not even applicable to Sowell. Were it applicable, Sowell's disclosure to Gore would be permissible because he could have done it without the court's permission. However, because § 14-7-1720(A) requires the leave of the court to disclose grand jury information, Sowell was appropriately held in contempt pursuant to § 14-7-1720(D) for his disclosure to Gore.[5]

Therefore, I would uphold the trial court's decision holding Sowell in contempt.

BURNETT, J., concurs.

[5] To further exemplify the contemptuous nature of Sowell's actions, the record indicates that a person under investigation by the grand jury, Curtis, paid a legal fee to Sowell to keep another suspect from testifying against Curtis. While Curtis paying Sowell a fee might not be the reason for the trial court holding Sowell in contempt, this fact epitomizes Sowell's total disregard for the much needed secrecy in the grand jury proceedings.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Ted Lee Heath, Appellant.

Appeal from York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 26200
Heard April 6, 2006 – Filed August 14, 2006

REVERSED

James W. Boyd, of Boyd & Jordan, of Rock Hill, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia, and Solicitor Thomas E. Pope, of York, for Respondent.

CHIEF JUSTICE TOAL: A jury found Ted Lee Heath (Appellant) guilty of trafficking in crack cocaine. This appealed followed. We reverse

and hold that Appellant was entitled to a directed verdict because the State failed to present evidence that Appellant was in constructive possession of crack cocaine.

FACTUAL / PROCEDURAL BACKGROUND

Appellant, who was twenty-two years old at the time of the arrest, lived in a house with his mother and a young child. Appellant's mother owned the house.

The police obtained a warrant to search for crack in and around the house. When the police arrived at the house to execute the warrant, Appellant and his brother were outside in front of the house. Appellant appeared to have just finished washing his car in front of the house. Appellant remained by the car in front of the house as the officers approached.

Upon the police officers' arrival, Appellant's brother immediately ran into the house and locked himself in the bathroom. After Appellant's brother was restrained, the police discovered crack cocaine and approximately two thousand, five hundred dollars in cash. In addition, the officers discovered scales and a small crack rock in the house. Further, officers discovered numerous plastic baggies; allegedly the type used by crack dealers.

Additionally, and at the center of this appeal, a police dog discovered a car-washing mitt in a recycling bin near the back door of the house containing 43.48 grams of crack cocaine.

A jury convicted Appellant of trafficking crack cocaine and Appellant was sentenced to 25 years imprisonment. We certified this case from the court of appeals pursuant to Rule 204(b), SCACR. Accordingly, the issue before this Court is:

> Did the trail court err in failing to direct a verdict in favor of Appellant because of the State's failure to establish an essential element of the crime?

LAW / ANALYSIS

A defendant is entitled to a directed verdict when the State fails to present evidence of the offense charged. *State v. McHoney*, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). In determining whether the trial court erred in denying a motion for directed verdict, we must view the evidence in the light most favorable to the State. *State v. Ballenger*, 322 S.C. 196, 198, 470 S.E.2d 851, 853 (1996).

The State alleges that Appellant violated South Carolina Code section 44-53-375(C). The Code provides that a "person … who is knowingly in actual or constructive possession of ten grams or more of … crack cocaine … is guilty of" trafficking in crack cocaine. The record reflects that the police found 43.48 grams of crack cocaine at Appellant's residence. The State does not dispute that Appellant was not in actual possession of the crack. Accordingly, the issue presented is whether the State proved that Appellant was knowingly in constructive possession of crack.

Mere presence is insufficient to prove constructive possession. *State v. Tabory*, 260 S.C. 355, 364, 196 S.E.2d 111, 113 (1973). In order to prove constructive possession, the "State must show a defendant had dominion and control, or the *right to exercise dominion and control* over" the [illegal substance]. *State v. Halyard*, 274 S.C. 397, 400, 264 S.E.2d 483, 486 (1980) (emphasis added). Further, the State may establish constructive possession by either circumstantial or direct evidence. *Id.* The defendant's knowledge and possession may be inferred if the substance was found on premises under his *control*. *State v. Adams*, 291 S.C. 132, 135, 353 S.E.2d 483, 486 (1987) (emphasis added).

In the present case, the police discovered crack in a car-washing mitt in a recycling bin outside near the back door of the house. The State presented no direct or circumstantial evidence linking Appellant to the 43.48 grams of crack. As a result, the question becomes whether Appellant had dominion and control over the property where the crack was found.

We hold that the State failed to present evidence that Appellant could exercise dominion and control over the area where the crack was found. Appellant lived in the home where the crack was found. However, the home is owned by Appellant's mother. As a result, it is arguable that Appellant merely had a right to access the area where the crack was found, not actual dominion and control of the property.

CONCLUSION

Accordingly, we reverse Appellant's conviction because the State failed to establish an essential element of the crime charged.

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

The Supreme Court of South Carolina

In the Matter of Michael T. Hursey, Respondent.

ORDER

The Office of Disciplinary Counsel (ODC) has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent has filed a return in which he consents to being placed on interim suspension and reports having made arrangements to protect the interests of his clients without the necessity of appointing an attorney to protect. In response to the return, ODC withdraws its request for the appointment an attorney to protect respondent's clients' interests at the present time.

Pursuant to Rule 17(b), RLDE, respondent's license to practice law in this state is hereby suspended until further order of the Court. Should it determine that it is in the best interests of respondent's clients or others to

appoint an attorney to protect, ODC may file a petition seeking appointment of an attorney to protect pursuant to Rule 31, RLDE.

IT IS SO ORDERED.

s/ Costa M. Pleicones A.C.J.
FOR THE COURT

Columbia, South Carolina

August 11, 2006

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Dorothy Windham, Appellant

v.

Donald Allen Riddle and
Jennifer D. Riddle, Respondents.

Appeal From Orangeburg County
Olin D. Burgdorf, Master-in-Equity

Opinion No. 4145
Heard March 7, 2006 – Filed August 7, 2006

REVERSED AND REMANDED

Clinch K. Belser, Jr., Michael J. Polk and H. Freeman Belser, all of Columbia, for Appellant.

Edgar W. Dickson, of Orangeburg, for Respondents.

HUFF, J.: In this property dispute, Dorothy Windham appeals the master-in-equity's finding that Donald and Jennifer Riddle (the Riddles) had an appurtenant easement for irrigation purposes over property owned by Windham. We reverse and remand.

FACTS

The Riddles and Windham are adjacent property owners in Orangeburg County. Both parties purchased their property from a common grantor, Danny Covington. Covington purchased the combined property in 1991 from Edisto Farm Credit. The previous owner, Marvin Davis, had used the property as a dairy farm. In 1992, Covington had the property surveyed and divided into two tracts, 1-A and 1-B.

On November 15, 1992, Covington and Windham entered into a contract of sale for tract 1-B (the Windham tract). Windham had ten years to complete the purchase of the tract but the contract allowed for early pre-payment. In addition to the terms of the sale, the contract provided in part:

> Seller to have a 50' easement of ingress and egress for the purpose of operating and maintaining an irrigation system. [S]aid easement to be centered over existing underground piping. Seller agrees not to pump pond lower than 4' below full stage. Existing overhead utilities easement to remain as is. When possible seller to run system at times convenient to buyer. Buyer not restricting use more than 36 hours at a given time. Seller to have all rights to use of waters in pond. . . .

Windham and her family used her tract as a family retreat, and visited approximately every other weekend. Covington continued to farm on tract 1-A.

In June of 1993, Covington leased part of tract 1-A (the Riddle tract) to the Riddles, who began to operate their dairy farm on the tract. In the spring

of 1994, Covington helped the Riddles install an aboveground irrigation system over the existing underground piping on the Windham tract. The pumping station for the irrigation system is located on the pond and takes water to the Riddle tract. Access to the pump is controlled by a locked gate on the Windham tract.

In 1997, Covington conveyed the Riddle tract to the Riddles. The deed provided:

> Said conveyance is subject to a 30-foot access easement, a 50-foot irrigation easement, a 25-foot access easement along existing woods[,] road and a canal, all as set forth and shown on the above-referenced plat.

On December 16, 1998, Covington deeded the tract to Windham. The deed stated, in part:

> Said conveyance is subject to a (fifty) 50 foot easement of ingress and egress for the purpose of operating and maintaining an irrigation system and an agreement as to the use of said irrigation easement and irrigation system as set forth in the certain Contract of Sale by and between Danny Covington a/k/a/ J. Danny Covington, as Seller and Dorothy Windham, as Buyer dated November 15, 1992 and recorded in the office of the Register of Deeds for Orangeburg County on December 28, 1991 . . . .

Initially, Windham allowed the Riddles to use the water in the pond in the manner described in the contract between Windham and Covington. However, Windham believed that the Riddles exceeded the use of the easement as contemplated in the original agreement between Covington and Windham. Accordingly, Windham brought suit seeking a declaratory judgment and injunctive relief asserting the easement created in their contract of sale and deed was an easement in gross and the Riddles had no right to this

easement.[1] The Riddles answered, contending Windham was estopped from denying the validity of the easement. Further, they asserted the easement is appurtenant to the Riddle tract.

After a trial, the master-in-equity found that the contract of sale between Windham and Covington, along with the Windham and Riddle deeds, created various easements for irrigation purposes. Additionally, the master concluded the easements were appurtenant and, therefore, passed to the Riddles when they purchased the Riddle tract. The master also found no action for trespass could be maintained because as owners of the dominant estate, the Riddles did not exceed the limits of the easement. Accordingly, the master dismissed Windham's complaint. The master subsequently denied Windham's motion to alter or amend the judgment. This appeal followed.

STANDARD OF REVIEW

The determination of the extent of a grant of an easement is an action in equity. Tupper v. Dorchester County, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997). Thus, this court may take its own view of the evidence. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

LAW/ANALYSIS

Windham argues the master erred by concluding the easement was appurtenant rather than in gross. We agree.

[1]In addition, Windham alleged the Riddles operated the irrigation pump excessively, drained the water in the pond too low, and left the gate open on the road to the pond, allowing strangers and cows to roam freely upon the Windham tract. Windham also maintained the Riddles' son hunted on the Windham tract without her permission.

Whether an express easement is appurtenant or in gross is determined by the nature of the right and the intention of the parties creating the easement. Tupper, 326 S.C. at 325, 487 S.E.2d at 191 (1997). In Tupper, the court explained the distinction between an easement in gross and an easement appurtenant:

> An easement in gross is a mere personal privilege to use the land of another; the privilege is incapable of transfer. In contrast, an appurtenant easement inheres in the land, concerns the premises, has one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof. It also passes with the dominant estate upon conveyance. Unless an easement has all the elements necessary to be an appurtenant easement, it will be characterized as a mere easement in gross.

Id. at 325, 487 S.E.2d at 191 (citations omitted).

In the present case, the contract of sale between Covington and Windham was an installment land contract. Typically, as in the contract here, the seller retains legal title until the purchase price has been fully paid, and the purchaser is entitled to immediate possession. See Lewis v. Premium Inv. Corp., 351 S.C. 167, 170-73, 568 S.E.2d 361, 363-64 (2002) (stating the seller retains legal title until the purchase price is fully paid and the vendee in possession of the land is the owner of an equitable interest in the property).

An easement cannot exist where both the purported servient and dominant estates are owned by the exact same person. Haselden v. Schein, 167 S.C. 534, 539,166 S.E.2d 634, 635 (1932). As Covington retained legal title to the Windham tract and also held title to the Riddle tract, no easement could have been created by the Windham contract of sale in 1992. [2]

[2] We find no language in the Riddle deed creating an appurtenant easement. The Riddle deed merely said the land was "subject to a 50-foot irrigation easement."

In 1998, Covington deeded the Windham tract to her. The Windham deed referred to the language in the contract of sale, which reserved an easement in the favor of "the Seller" only. By the time of the transfer of the deed and creation of the easement, Covington no longer owned the Riddle tract, the land benefited by the easement.

We find the current case similar to Springob v. Farrar, 334 S.C. 585, 514 S.E.2d 135 (Ct. App. 1999). In Springob, Dr. Shenoy owned Lot 14, and his wife owned the adjoining lot, Lot 13, where the Shenoys's home was located. The Shenoys built a well on Lot 14 and attached the well to an irrigation system serving Lot 13. In 1986, Dr. Shenoy sold Lot 14 to L.G.B., Inc., and the deed "reserved to Grantor" an easement on Lot 13 for use of the well on Lot 14. A house was built on Lot 14 and eventually the Farrars bought the property. The Farrar deed stated "this conveyance is subject to all easements . . . of record affecting said property." Their closing attorney informed them of the well located on their property. In 1989, Mrs. Shenoy sold Lot 13 to Kenneth Perry, and South Carolina Federal Savings Bank obtained title to the lot through foreclosure. While Lot 13 was vacant, the Farrars disconnected the well on their property from the Lot 13 irrigation system and connected it to their own system serving Lot 14.

In 1993, Springob purchased Lot 13 and eventually demanded use of the well. When the Farrars refused, Springob brought suit. In finding the easement was in gross rather than appurtenant, this court elucidated:

> In this case, [the] L.G.B. Deed reserved an easement in favor of "the Grantor." The grantor of the L.G.B. Deed was Dr. Shenoy, the sole owner of Lot 14. Because the easement was reserved for Dr. Shenoy only, and Dr. Shenoy did not own Lot 13, the lot benefit[]ed by the easement, the requirement that an appurtenant easement have "one terminus on the land of the party claiming it" is not satisfied.

Id. at 589, 514 S.E.2d at 137-38.

Similar to the reservation in Springob, the language in the contract of sale referred to in the Windam deed reserved the easement for "the Seller" only. Like Dr. Shenoy, Covington did not own the purported dominant estate at the time of the creation of the easement. The requirement that an appurtenant easement have a terminus on the land of the party claiming it is not satisfied. Accordingly, because the elements of an appurtenant easement are not present, the presumption that exists in favor of appurtenant easements simply is not applicable. See Springob, 334 S.C. at 589 n.3, 514 S.E.2d at 138 n.3. We conclude the master erred in holding the easement was appurtenant rather than in gross.

Windham also argues the master erred in failing to enjoin the Riddles from crossing the Windham tract. Because we hold the easement was in gross and thus the Riddles had no right to use the easement, we find the master erred by not enjoining the Riddles from using the easement.

CONCLUSION

Accordingly, for the foregoing reasons, the decision of the master finding the Riddles possessed an irrigation easement appurtenant to their land is reversed and the matter remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

GOOLSBY, J., concurs. STILWELL, J., dissents in a separate opinion.

STILWELL, J., (dissenting): I respectfully dissent because I conclude an appurtenant easement was established in the contract for the sale of the land from Covington to Windham. The majority finds no appurtenant easement was created because Covington needed to both (1) retain a sufficient interest in the land he sold by contract to Windham, and (2) remain the owner of the dominant estate until title passed to Windham. I am not

convinced either proposition is essential to the creation of the easement appurtenant in this case.

As a threshold issue, there is a question as to the proper scope of appellate review. As stated in the majority opinion, the determination of the extent of an easement is a question in equity, allowing the appellate court to take its own view of the evidence. Slear v. Hanna, 329 S.C. 407, 410-11, 496 S.E.2d 633, 635 (1998). However, the determination whether an easement exists is a question of fact in a law case subject to an "any evidence" standard of review when tried by a judge without a jury. Id. at 410, 496 S.E.2d at 635; Jowers v. Hornsby, 292 S.C. 549, 551-52, 357 S.E.2d 710, 711 (1987). If this case is viewed from the standpoint of whether an appurtenant easement was created, then it is a law case and our scope of review is narrow. Nevertheless, I am convinced that under either a narrow or broad scope of review, the trial judge's analysis should prevail.

The key to resolving this case lies in determining when the easement was created. The majority cites Haselden v. Schein, 167 S.C. 534, 539, 166 S.E. 634, 635 (1932), for the proposition that an easement cannot exist where both the purported servient and dominant estates are owned by the same person. Because Covington retained bare legal title to the tract he sold by contract to Windham, the majority opinion concludes his ownership violates the Haselden rule. However, the facts and holding of Haselden are inapposite. In Haselden, the dominant and servient estates were merged well after the creation of the easement, and the court ultimately concluded the easement was not extinguished, stating "[t]he rule of law that an easement may be extinguished by the conveyance of the servient estate without notice to the purchaser, of the easement, carries with it the idea that there has been an intentional concealment or deception which imposed upon the purchaser. No such thing is shown here." Id. at 540, 166 S.E. at 636. There is no contention that any concealment, intentional or otherwise, is involved in this case.

In my view, the majority errs in dismissing the possibility that the easement was created in the contract for the sale of the land from Covington to Windham. That document, rather than the deed, is the instrument that

established the legal relationship between the parties. It was the functional equivalent of a conveyance coupled with a method of financing "frequently called a 'poor man's mortgage.'" See Lewis v. Premium Inv. Corp., 351 S.C. 167, 171, 568 S.E. 2d 361, 363 (2002) (containing an excellent discussion concerning the nature and characteristics of an installment contract for the sale of land). All rights of possession to the land described in the contract were conveyed to Windham, and had Covington not reserved the easement in the contract, he would never have been able to assert an easement of any type upon the later transfer of the bare legal title, even if he had still owned the dominant estate. Any attempt to do so would have been a breach of the terms of the contract that established the legal relationship between the parties.

There is little legal distinction, insofar as the respective rights of the parties are concerned, between a transaction consisting of a deed and note and mortgage as security for the payment of the remaining purchase price and an executory contract requiring retention of the title in the seller until the purchase price is totally paid. As stated in Lewis, "[f]or years, in an executory contract for the sale of land our Court has equated the vendor with the mortgagee and the vendee with the mortgagor." Id. at 173, 568 S.E.2d at 364 (citing Dempsey v. Huskey, 224 S.C. 536, 80 S.E.2d 119 (1954)); see also Southern Pole Bldgs., Inc. v. Williams, 289 S.C. 521, 524, 347 S.E.2d 121, 122-23 (Ct. App. 1986).

Because I conclude the easement appurtenant was created in the contract for the sale of the land, no discussion of the requirement that an appurtenant easement have one terminus on the land of the party claiming is necessary. See Springob v. Farrar, 334 S.C. 585, 589, 514 S.E.2d 135, 137 (Ct. App. 1999) (requiring an appurtenant easement have a terminus on the land of the party claiming the easement). Nevertheless, Springob, heavily relied upon by the majority, is easily distinguishable. In Springob, the person who reserved the easement never owned the purported dominant estate, only owning at one time the servient estate. Id. at 587, 514 S.E.2d at 136. In this case, Covington unquestionably owned the dominant estate at the time the contract was entered into.

Furthermore, the fact that the Riddle deed did not create an appurtenant easement, as noted in footnote 2 of the majority opinion, is not dispositive. The deed to the Riddles could not have been an instrument used to create an easement over the Windham tract. It could have mentioned that easement, since the Riddle deed conveyed the dominant estate. However, there is no necessity to expressly mention an easement appurtenant when conveying the dominant estate. Smith v. Comm'r of Pub. Works, 312 S.C. 460, 468, 441 S.E.2d 331, 336 (Ct. App. 1994). The easement is but one of the numerous "rights, members, hereditaments and appurtenances to said premises belonging or in any wise incident or appertaining" and accompanies the conveyance of the fee. S.C. Code Ann. § 27-7-10 (Rev. 1991).

In my judgment, all the elements necessary for the creation of an easement appurtenant were in existence at the time the contract was entered into between Covington and Windham, and the later conveyance of the "bare legal title" was a required fulfillment of the contractual terms already set in stone. I would affirm, and I therefore dissent.

The South Carolina Court of Appeals

Commander Health Care Facilities, Inc., Appellant,

v.

South Carolina Department of Health and Environmental Control and Heritage Home of Florence, Respondents.

The Honorable James E. Brogdon, Jr.
Florence County
Trial Court Case No. 2001-CP-21-00441

ORDER GRANTING PETITION FOR REHEARING
AND DISPENSING WITH ORAL ARGUMENT

After careful consideration of the petition for rehearing, the court finds basis for granting the rehearing, but dispenses with oral argument on the rehearing. Accordingly, the petition for rehearing is granted, and the attached opinion is filed in the case.

Kaye G. Hearn, C.J.

Donald W. Beatty, J.

Paul E. Short, Jr., J.

Columbia, South Carolina
8/14/2006

cc: Wm. Howell Morrison, Esq.
Phyllis W. Ewing, Esq.
Cheryl Harris Bullard, Esquire
Karl A. Folkens, Esq.
Philip B. Atkinson, Esq.
Matthew Summers Penn, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Commander Health Care Facilities, Inc., Appellant,

v.

South Carolina Department of Health and Environmental Control and Heritage Home of Florence, Respondents.

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

Opinion No. 4146
Heard September 12, 2005 – Filed August 7, 2006

AFFIRMED

Wm. Howell Morrison and Phyllis W. Ewing, both of Charleston, for Appellant.

Cheryl Harris Bullard and Matthew Summers Penn, both of Columbia and Karl A. Folkens and Philip B. Atkinson, both of Florence, for Respondents.

HEARN, C.J.: In this declaratory judgment action, Commander Health Care Facilities, Inc. appeals the circuit court's grant of summary judgment in favor of the South Carolina Department of Health and Environmental Control and Heritage Home of Florence. We affirm.

FACTS

Commander Health Care Facilities and Heritage Home of Florence both operate nursing home facilities in Florence County. In 1997, Heritage Home applied for and was granted a certificate of need (CON) by the South Carolina Department of Health and Environmental Control (DHEC) for the replacement of forty-four Medicaid beds with forty-four residential care beds. In May 1998, Heritage Home applied for another CON for the addition of sixty new nursing home beds to be dedicated to serving Medicaid patients.

In June 1998, the South Carolina legislature passed the 1998 Appropriation Bill, including Proviso 9.35 which appropriated funds for Medicaid patient days for the 1998-1999 fiscal year. Proviso 9.35 provided:

> The Department will allocate additional Medicaid patient days authorized above the previous fiscal year's level as provided in Proviso 9.18 based on a percentage of the additional requested Medicaid patient days and a percentage of the need indicated by the community long term care waiting list. Notwithstanding any other provision of law, of the additional patient days authorized above the previous year's level as provided in Proviso 9.18 the Department may approve in priority order (1) additional Medicaid nursing home patient days to those nursing homes currently holding a Medicaid

> nursing home permit; (2) Medicaid nursing home patient days to those nursing homes that are currently licensed, but do not participate in the Medicaid program; and (3) Medicaid nursing home patient days to those nursing homes that have been approved under the Certificate of Need Program and are under construction with a valid contract.

Act No. 0419, 1998 S.C. Acts, Proviso 9.35. This bill, which became effective on July 1, 1998, authorized a substantial number of additional Medicaid patient days and set forth provisions for granting permits for the additional Medicaid days "notwithstanding any other provision of law." At the time this bill passed, Heritage Home had already requested approval of additional Medicaid beds through the May CON.

In September 1998, Senator Hugh Leatherman of Florence requested an interpretation of Proviso 9.35 from DHEC Commissioner Douglas E. Bryant. After researching the legislative intent of the proviso, Commissioner Bryant responded to Senator Leatherman by letter opining the Proviso applied to currently licensed beds plus those nursing home beds issued under a 1998 certificate of need. Commissioner Bryant also stated that Proviso 9.35 would allow for the expansion of Medicaid beds without requiring a CON because the "legislative intent was to maximize the number of beds available."

On October 5, 1998, DHEC authorized Heritage Home to license forty-four additional Medicaid beds under Proviso 9.35 and withdrew Heritage Home's pending May 1998 CON. DHEC never issued a CON for the new Medicaid beds; the only approval was pursuant to Proviso 9.35. Commander never applied for any of the additional Medicaid beds under Proviso 9.35, nor did DHEC deny Commander approval for additional beds under the proviso.

In June 2000, Commander filed a declaratory judgment action seeking to overturn DHEC's approval of additional new Medicaid beds for Heritage Home. Commander also sought a declaration that DHEC's grant of permission to Heritage Home to build new Medicaid beds under Proviso 9.35 without obtaining a CON was in violation of the provisions of the South Carolina Code prohibiting special legislation. In addition, Commander

sought a permanent injunction prohibiting DHEC from authorizing the construction of new Medicaid beds under Proviso 9.35 without requiring facilities to obtain a CON. Commander and Heritage Home, together with DHEC, filed cross-motions for summary judgment. Heritage Home and DHEC argued Commander lacked the standing necessary to maintain the declaratory judgment action. The circuit court agreed, and granted the motion. This appeal followed.

LAW/ANALYSIS

Commander argues the circuit court erred in (1) finding Commander lacked standing, and (2) granting summary judgment in favor of Heritage Home and DHEC. We disagree.

I. Standing

Commander contends the circuit court erred in finding that it suffered no injury in fact, and therefore, lacked standing to maintain the declaratory judgment action. We disagree.

As a general rule, to have standing, a litigant must have a personal stake in the subject matter of the litigation. Glaze v. Grooms, 324 S.C. 249, 478 S.E.2d 841 (1996). One must be a real party in interest. Charleston County Sch. Dist. v. Charleston County Election Comm'n, 336 S.C. 174, 181, 519 S.E.2d 567, 571 (1999). Constitutional standing requires, at a minimum, that the party bringing the action sustain a direct injury or the immediate danger a direct injury will be sustained. Beaufort Realty Co. v. South Carolina Coastal Conservation League, 346 S.C. 298, 302-03, 551 S.E.2d 588, 589-90 (Ct. App. 2001); see also Baird v. Charleston County, 333 S.C. 519, 530, 511 S.E.2d 69, 75 (1999). The injury must be of a personal nature to the party bringing the action, not merely of a general nature that is common to all members of the public. Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 34, 530 S.E.2d 369, 371 (2000).

Our supreme court has articulated a stringent standing test. Sea Pines Ass'n for the Prot. of Wildlife v. South Carolina Dep't of Natural Res. & Cmty. Servs. Assocs., Inc., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001).

A party seeking to establish standing must prove the "irreducible constitutional minimum of standing," which consists of three elements: (1) the plaintiff must have suffered an injury in fact; (2) the injury and the conduct complained of must be causally connected; and (3) it must be likely, rather than merely speculative, that the injury will be redressed by a favorable decision. Id. (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)). The party seeking to establish standing carries the burden of demonstrating each of the three elements. Sea Pines, 345 S.C. at 601, 550 S.E.2d at 291.

An "injury in fact" has been defined as "an invasion of a legally protected interest" which is "concrete and particularized" and "actual or imminent," not "conjectural or hypothetical." Lujan, 504 U.S. at 561. In order for the injury to be particularized, it must affect the plaintiff in a personal and individual way. Sea Pines, 345 S.C. at 601, 550 S.E.2d at 291; see also Beaufort Realty, 346 S.C. at 301, 551 S.E.2d at 589 (finding one must suffer an actual injury in fact, not a concern of future harm, in order to satisfy the Lujan test).

Commander argues that because the forty-four Medicaid beds issued to Heritage Home are permanently removed from the pool of available beds in Florence County, it will be unable to add additional Medicaid beds to its facility in the future. However, a "prospective concern of future harm" is not sufficient to satisfy the Lujan test. See Sea Pines, 345 S.C. at 602, 550 S.E.2d at 291. The mere likelihood that if Commander applies for new beds it will not receive them due to DHEC's action in awarding Heritage Home beds under Proviso 9.35, is too tenuous to maintain standing. See Beaufort Realty, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (holding constitutional standing requires, at a minimum, a direct injury or the immediate danger a direct injury will be sustained.). Accordingly, Commander must prove that it is injured by the issuance of the forty-four new Medicaid beds to Heritage Home under Proviso 9.35.

Commander submitted no evidence to the circuit court establishing any harm it suffered as a result of DHEC's issuance of Medicaid beds to Heritage Home under Proviso 9.35. It failed to put forth any evidence that it applied for and was denied Medicaid beds contemporaneous with or since Heritage Home was awarded beds under the Proviso and has not asserted that it has

any particular plans to apply for beds in the future.[1] See Sea Pines, 345 S.C. at 601, 550 S.E.2d at 291 ("The party seeking to establish standing carries the burden of demonstrating each of the three element."). Furthermore, Commander never applied for additional Medicaid beds under the CON process, and as a result, cannot adduce evidence that it lost Medicaid beds because of the issuance of Medicaid beds to Heritage Home under the Proviso. Additionally, no affidavit or deposition testimony was offered to establish a loss of competitive advantage or unequal treatment under Proviso 9.35. In fact, the Joint Annual Report of Nursing Care Facilities demonstrates the occupancy rate for Commander's licensed beds has remained constant from 1997 through 2001 at approximately ninety-nine percent. Commander's allegations that it may lose the opportunity for additional Medicaid beds in the future as a result of Heritage Home receiving forty-four new Medicaid beds are based purely upon conjecture. Therefore, Commander failed to carry its burden of proving it suffered an injury in fact. Accordingly, Commander cannot satisfy the Lujan standing requirements.[2]

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[1] We are cognizant of the fact that Commander could not have anticipated DHEC's interpretation of Proviso 9.35 would allow it to apply for Medicaid beds without participating in the formal CON process. However, Commander could have applied for beds under the CON process.

[2] We also reject Commander's argument on rehearing that it has standing pursuant to principles governing taxpayer standing. Commander never advanced the argument of taxpayer standing to the circuit court or in its brief. It is a well-settled principle of appellate advocacy that "[t]he losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000). "This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." Id.; see also Collins Entertainment Corp. v. Coats and Coats Rental Amusement, Op. No. 26136 (S.C.Sup.Ct. filed Apr. 10, 2006) (Shearouse Adv.Sh. No. 15 at 32); Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (holding an issue cannot be raised for the first time on appeal, but must have been raised to and ruled

II. Summary Judgment

Commander argues the circuit court erred in granting summary judgment in favor of Heritage Home and DHEC. Specifically, Commander contends the circuit court erred in adopting DHEC's interpretation of Proviso 9.35 that the term "Medicaid patient days" as used in the proviso is synonymous with the term "Medicaid patient beds" as used in the CON program. Because we hold Commander lacked the standing necessary to maintain this action, we decline to address this argument. See Whiteside v. Cherokee County School Dist. No. One, 311 S.C. 335, 428 S.E.2d 886 (1993) (holding an appellate court need not address remaining issues when the resolution of a prior issue is dispositive).

CONCLUSION

Because Commander lacked the standing necessary to maintain its action against Heritage Home and DHEC, the decision of the circuit court is hereby

AFFIRMED.

BEATTY and SHORT, JJ. concur.

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upon by the trial judge to be preserved for appellate review); State v. Cutro, 332 S.C. 100, 107, 504 S.E.2d 324, 327 (1998) (holding an issue which is procedurally barred should not be raised sua sponte by an appellate court); Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal.") (emphasis added).