Judicial Merit Selection Commission

Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6092

M E D I A R E L E A S E
August 23, 2004

The Judicial Merit Selection Commission is currently accepting applications for the judicial offices listed below. In order to receive application materials, a prospective candidate must notify the commission in writing that he or she intends to apply for a specific seat. Correspondence and questions must be directed to the Judicial Merit Selection Commission as follows:

Michael N. Couick, Chief Counsel
Post Office Box 142, Columbia, South Carolina 29202
(803) 212-6623

The commission will not accept applications after 12:00 noon on Wednesday, September 22, 2004.

The term of the office currently held by the Honorable Paul E. Short, Jr., Judge of the Court of Appeals, Seat 1, will expire on June 30, 2005.

The term of the office currently held by the Honorable H. Bruce Williams, Judge of the Court of Appeals, Seat 2, will expire on June 30, 2005.

A vacancy exists in the office of Judge of the Circuit Court for the Sixth Judicial Circuit, Seat 1, formerly held by the Honorable Paul E. Short, Jr. The successor will fill the term of that office which expires on June 30, 2010.

A vacancy will exist in the office currently held by the Honorable B. Hicks Harwell, Jr., Judge of the Circuit Court for the Twelfth Judicial Circuit, Seat 1, upon Judge Harwell's retirement before the end of the year 2005. The successor will fill the term of that office which expires on June 30, 2006, and the subsequent full term which expires on June 30, 2012.

A vacancy exists in the office of Judge of the Family Court for the Fifth Judicial Circuit, Seat 1, formerly held by the Honorable H. Bruce Williams. The successor will fill the term of that office which expires on June 30, 2010.

A vacancy exists in the office of Judge of the Administrative Law Court, Seat 2, upon the resignation of the Honorable C. Dukes Scott. The successor will fill the term of that office which expires on June 30, 2007.

The term of the office currently held by the Honorable Carolyn C. Matthews, Judge of the Administrative Law Court, Seat 3, will expire on June 30, 2005.

The term of the office currently held by the Honorable John D. Geathers, Judge of the Administrative Law Court, Seat 4, will expire on June 30, 2005.

A vacancy exists in the office of Master-in-Equity for Calhoun County upon the death of the Honorable Thomas P. Culclasure. The successor will fill the term of that office which expires on August 14, 2009.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at www.scstatehouse.net/html-pages/judmerit.html.

* * *

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
E-MAIL: dshearouse@scjd.state.sc.us

N O T I C E

IN THE MATTER OF DAVID E. BELDING, PETITIONER

On November 10, 2003, Petitioner was suspended from the practice of law for a period of one year. In the Matter of Belding, 356 S.C. 319, 589 S.E.2d 197 (2003). He has now filed a petition to be reinstated.

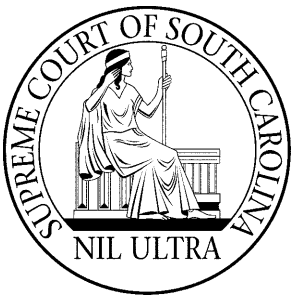
Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than October 19, 2004.

Columbia, South Carolina

August 20, 2004



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 33

August 23, 2004

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

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Benjamin Harden, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Richland County
L. Casey Manning, Post-Conviction Judge

Opinion No. 25858
Submitted January 22, 2004 - Filed August 16, 2004

AFFIRMED

Tara Shurling, of Columbia, for Petitioner.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Donald J. Zelenka, Chief, Capital and Collateral Litigation, Assistant Deputy Attorney General B. Allen Bullard, and Assistant Attorney General David Spencer, all of Columbia, for Respondent.

JUSTICE BURNETT: We granted certiorari to review the denial of Benjamin Harden's (Petitioner's) second application for post-conviction relief (PCR). We granted Petitioner's first application for PCR, which was denied after a hearing, and dismissed his petition for failure of counsel to perfect the appeal. Petitioner's motion to reinstate the appeal was denied.

Petitioner's second PCR application seeks review, pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), of the denial of his PCR application. The PCR judge found Petitioner was entitled to belated review of the denial of his first PCR application. Given the unique circumstances presented, we granted certiorari and directed Petitioner to address the question on which this Court originally granted certiorari.

FACTUAL BACKGROUND

Petitioner was indicted for one count of trafficking crack cocaine by conspiracy between April 1, 1997, and September 23, 1997, in violation of S.C. Code Ann. § 44-53-375(C)(3) (2002) and four counts of distribution of crack cocaine, in violation of S.C. Code Ann. § 44-53-375(B)(1) (2002). Each count of distribution occurred between April 1, 1997, and September 23, 1997. On each occasion Petitioner sold crack cocaine to undercover agents or witnesses. On January 5, 1998, Petitioner pled guilty to trafficking and to four counts of distribution. The trial judge sentenced Petitioner to twenty years for trafficking and concurrent fifteen-year sentences for each count of distribution.

ISSUE

> Was plea counsel ineffective for failing to object to and advise Petitioner his convictions for both trafficking crack cocaine based on conspiracy and the four distribution charges would violate double jeopardy?

ANALYSIS

Petitioner argues his convictions violate double jeopardy principles because all of the distribution counts occurred during the period encompassed by the trafficking indictment. He argues PCR counsel was ineffective in failing to raise the issue. We disagree.

A defendant who pleads guilty on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing (1) counsel's representation fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for, counsel's errors, the defendant would not have pled guilty, but would have gone to trial. Hill v. Lockhart, 474 U.S. 52, 56-57, 106 S.Ct. 366, 369, 88 L.Ed.2d 203, 208 (1985); McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995). Petitioner bears the burden of proving both attorney error and prejudice. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

There is no statutory law or judicial precedent in this State which holds a conviction for both conspiracy and the substantive offense relating to the conspiracy, in violation of the trafficking statute, constitutes double jeopardy. An attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction. State v. Gilmore, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999). Therefore, Petitioner's counsel was not deficient in failing to advise Petitioner or object to Petitioner's sentencing on the double jeopardy issue.

Petitioner relies on Matthews v. State, 300 S.C. 238, 387 S.E.2d 258 (1990). In Matthews, we concluded possession with intent to distribute marijuana is a lesser included offense of trafficking in marijuana when the trafficking charge is based on possession. Therefore, we held a defendant may not be convicted of both possession with intent to distribute and trafficking based on possession. Where possession of an identical amount of marijuana would sustain convictions for both possession with intent to

distribute and trafficking based upon possession, the General Assembly did not intend to permit punishment under both statutory provisions.[1]

The present case is distinguishable. In Matthews, the convictions at issue were based on a single act of possession. A review of the record shows that in this case the trafficking conviction was based on a broader conspiracy than the individual transactions which supported the distribution charges.

When examining issues related to a guilty plea, it is appropriate to consider the entire record, including the transcript of the guilty plea, and the evidence presented at the PCR hearing. Anderson v. State, 342 S.C. 54, 535 S.E.2d 649 (2000). The solicitor's comments at the plea hearing demonstrate the factual circumstances of this case are unlike those in Matthews. At the plea hearing, the solicitor stated the distribution indictments were all based on audio-taped drug transactions. Regarding the trafficking indictment, however, the solicitor stated:

> [T]his is a hardened drug family or drug network run by [Petitioner] . . . . [F]or at least the last six or seven years [Petitioner] and his family have been probably the most dangerous and biggest nuisance that Richland County has had. [Petitioner] had no less than eight to ten people that worked directly with him . . . He had a number of trailers where he would sell crack cocaine out of. They set up a videotape on [March 10, 1997] and it worked for 29 days . . . during the daylight hours . . . and over 424 visits were made to that one trailer alone that were drug related . . .We have audiotape of [Petitioner] talking about buying a kilo [and] how he was going to make it and turn it into crack . . .[On May 18, 1997], one of

[1] The Court did not apply the test set forth in Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932). The Blockburger rule is not controlling when legislative intent is clear from the face of the statute or legislative history. Garrett v. United States, 471 U.S. 773, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985).

> our state's witnesses . . . saw [Petitioner] with approximately a kilogram of cocaine. There are also audiotapes of [Petitioner's] sisters; again a family business, where they talk about how to make good crack cocaine.

The solicitor's statements demonstrate the trafficking by conspiracy charge was not based solely on the four instances of distribution for which Petitioner was indicted. Instead, the trafficking charge was based on a pattern of unlawful drug activity over the course of a six-month period.

In sum, neither Matthews , supra, nor any other case, holds Petitioner's conviction for conspiracy to traffic cocaine and the four counts of distributing cocaine violate double jeopardy. Therefore, counsel was not deficient in failing to advise his client on the issue or object to the sentence imposed.

Although, unnecessary for resolution of this case, in the interest of judicial economy, we address the underlying double jeopardy issue. The double jeopardy clauses of the United States and South Carolina Constitutions protect against multiple punishments for the same offense. State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999). A threshold inquiry in this case is whether the same act is involved in different charges. Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Trafficking may be accomplished by several means, including conspiracy.[2] Conspiracy is a separate offense from the substantive offense,

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[2] S.C. Code Ann. § 44-53- 375(C) states,

> A person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of ten grams or more of ice, crank, or crack cocaine . . . is guilty of a felony

which is the object of the conspiracy. A defendant may be separately indicted and convicted of both the conspiracy, and the substantive offenses committed in the course of the conspiracy. State v. Gordon, 356 S.C. 143, 149, 588 S.E.2d 105, 108 (2003).[3]

CONCLUSION

For the foregoing reasons, we hold (1) counsel was not ineffective in failing to advise his client or in failing to object to the double jeopardy issue and (2) there is no underlying double jeopardy violation supporting Petitioner's claim.

AFFIRMED.

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

> which is known as "trafficking in ice, crank, or crack cocaine" . . . .

[3] Petitioner's reliance on our holding in Harris v. State, 349 S.C. 46, 562 S.E.2d 311 (2002) is misplaced. The issue in Harris was whether conspiracy to traffic was properly classified as a violent offense. South Carolina law provides drug trafficking is a violent offense. We concluded because conspiracy to traffic is one way to traffic drugs under the relevant statutes, conspiracy to traffic cocaine was a violent crime. Since the facts in Petitioner's case do not implicate Harris, it has no bearing on Petitioner's double jeopardy issue.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Bennie Wicker, Respondent,

v.

South Carolina Department of Corrections, Appellant.

AFFIRMED

Appeal From Newberry County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 25859
Submitted April 21, 2004 - Filed August 23, 2004

Lake Eric Summers, of Vinton D. Lide & Associates, of Lexington, for Appellant.

Bennie Wicker, Jr., of Bennettsville, pro se.

JUSTICE WALLER: This is a direct appeal from an order of the circuit court which affirmed the decision of the Administrative Law Judge (ALJ). The ALJ held that Respondent, Bennie Wicker, was entitled to be compensated the prevailing wage of $5.25 per hour for the time he was in training for his employment at the South Carolina Department of Corrections (DOC) Division of Prison Industries. We affirm.

FACTS

Wicker, while an inmate at Evans Correctional Institute, participated in the Prison Industries Program. During the first 320 hours of his employment, he was paid .25-.75 per hour; he was thereafter paid an hourly wage of $5.25. He filed an inmate grievance contending his training wages violated the Prevailing Wage Statute, S.C. Code Ann. § 24-3-430(D) (Supp. 2002). The DOC denied his appeal, and he appealed to the Administrative Law Judge (ALJ). The ALJ reversed the DOC's decision, finding Wicker was entitled to the prevailing wage during his first 320 hours of employment, and finding no authority for the DOC to deviate from the plain requirement of § 24-3-430. Accordingly, the DOC was ordered to compensate Wicker at a rate of $5.25 per hour for his first 320 hours of work. The circuit court affirmed.

ISSUE

Did the circuit court err in holding Wicker was entitled to a $5.25 per hour training wage?

DISCUSSION

The statutes under which Wicker seeks relief are part of a statutory scheme creating a Prison Industries (PI) program to provide for employment of convicts and utilize their labor for self-maintenance and reimbursement of expenses. See S.C. Code Ann. § 24-3-310 (Supp. 2003). In 1995, the General Assembly enacted S.C. Code Ann. § 24-3-430, authorizing the DOC to use inmate labor in private industry. Section 24-3-430 (D) provides that, "[n]o inmate participating in the program may earn less than the prevailing wage for work of similar nature in the private sector." Wicker filed an inmate grievance with the DOC, alleging his training wage of .25-.75 per hour was in violation of the statute. The DOC denied his grievance and he appealed to the ALJ, who reversed. The ALJ found no statutory authority for DOC to pay Wicker less than the prevailing wage; the circuit court affirmed.

The DOC appeals, contending the statutes under which Wicker seeks relief do not entitle him to the prevailing wage, and asserting the ALJ was without subject-matter jurisdiction to hear his appeal.

As recognized in the companion case of Adkins v. South Carolina Dep't of Corrections, Op. No. 25860 (S.C. Sup. Ct. filed August 23, 2004), we agree with the DOC that section 24-3-430 (D) does not give rise to a private, civil cause of action in Wicker. However, simply because Wicker may not file a civil claim for damages in circuit court does not mean he is without any remedy. There are numerous issues relating to inmates which, although not giving rise to a private, civil cause of action, are nonetheless grievable through DOC's internal grievance processes. For example, although inmates may not sue for civil damages on matters relating to parole, work release, or work credits, they may enforce such rights via DOC grievance procedures. We find no reason such procedures should not apply when an inmate challenges the wages he or she is being paid, particularly where there is a statute mandating payment of the prevailing wage. Accordingly, we hold that although Wicker has no claim for civil damages, he properly filed a grievance with the DOC.

The DOC also contends, citing the ALJD's en banc decision in McNeil v. South Carolina Dept. of Corrections, 02-ALJ-04-00336-AP (filed Sept. 5, 2001), that the ALJ was without subject-matter jurisdiction to review its denial of Wicker's grievance. We disagree.

We find that where, as here, the state has created a statutory right to the payment of a prevailing wage, it cannot thereafter deny that right without affording due process of law. Cf. Piatt v. MacDougall, 773 F.2d 1032, 1036 (9th Cir. 1985) (where state has established, by statute, a right of inmates to compensation for work performed for private parties, it cannot deny that right after they earned the wages, without affording due process of the law); Borror v. White, 377 F. Supp. 181 (W.D.Va.1974) (although there was no federal constitutional right to payment, inmate might be entitled to such compensation under state statute).

We are not unmindful of our opinion in Sullivan v. South Carolina Dep't of Corrections, 355 S.C. 437, 586 S.E.2d 124 (2003), in which we held the ALJ has jurisdiction to review DOC grievance proceedings only if they involve the denial of "state created liberty interests." There, we recognized that our opinion in Al-Shabazz v. State, 338 S.C. 354, 368, 527 S.E.2d 742, 750 (1999), held that administrative matters **typically** arise in two ways: (1) when an inmate is disciplined and punishment is imposed and (2) when an inmate believes prison officials have erroneously calculated his sentence, sentence-related credits, or custody status. However, we did not limit Al-Shabazz to these two instances. The Al-Shabazz Court explained that procedural due process is guaranteed when an inmate is deprived of an interest encompassed by the Fourteenth Amendment's protection of liberty and property. 338 S.C. at 369, 527 S.E.2d at 750.

We find the state's statutory mandate that inmates be paid the prevailing wage creates such an interest, which may not be denied without due process. Piatt v. McDougall, supra. Accordingly, in this **very limited circumstance**,[1] we hold the DOC's failure to pay in accordance with the statutes is reviewable by the ALJ.

Finally, we concur with the ALJ and the circuit court that there is simply nothing in the statutory scheme authorizing the DOC to pay Wicker a training wage less than the prevailing wage. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (If a statute's language is plain, unambiguous, and conveys a clear meaning, "the rules of statutory interpretation are not needed and the court has no right to impose another meaning"). Accordingly, the judgment below is affirmed.

AFFIRMED.

TOAL, C.J., and BURNETT, J., concur. PLEICONES, J., dissenting in a separate opinion. MOORE, J., not participating.

[1] We note that our holding today is extremely limited and is not to be viewed as expanding the jurisdiction of the ALJD in any other circumstance.

JUSTICE PLEICONES: As explained more fully in my concurring opinion in Adkins v. South Carolina Dep't of Corrections, Op. No. 25860 (S.C. Sup. Ct. filed August 23, 2004), I would hold that respondent's remedy is found in the South Carolina Payment of Wages Act, S.C. Code Ann. §§ 41-10-10, *et seq*. (Supp. 2003). Accordingly, I dissent.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Richard Adkins, Shakur Ali, Kelly Ayers, Phillip Barnett, Terry Beachum, Phillip Bennett, Bobby Boozer, John Brannon, Christopher Brown, Norman Bryson, Bernard Byrd, Sirrico Burnside, Bradley Cain, Donnie Clark, Francis Coker, John Cosby, Robert Davila, Billy Joe Davis, Bobby Davis, Terry Elliott, David Ellison, Robert Elmore, Garnell Evans, Anthony Frazier, Calvin Garrett, Charles Gove, Willie Gray, William Griffin, Claude Hamrick, Floyd Hamilton, David Harig, James Heatherly, James Hicks, Demetric Hill, Joey Irby, William Joel Jackson, Hubert Jacobs, James Jeffries, Robert Jones, Robert Johnson, Andrew Kelly, Willie Ladson, Ricky Major, Alvin Manigault, Lavaul Manigault, Larry McClary, Earl McCoy, Benjamin McInnis, Phillip Meredith, Randall Miller, John Millwood, Johnny Minter, Timothy Moore, Tony Mossberg, Jerry Neal, Kendrick Nesbitt, Walter Owens, Ricky Paige, Gerald Pridmore, Darrell Pryor, Ronald Pryor, David Teiner, Gregory Scott, Michael Scott, Michael Shell, Robert Simpson, Ralph Sims, Christopher Smith, Arthur Stephenson, Dean Stevens, Leroy

Sullivan, Dennis Thomason, Douglas Thompson, Eric Thompson, Douglas Tittus, Albert Todd, Donald Todd, Stevie Upton, Richard Ward, Frank Weathers, Herman Whitehead, Anthony Wilson, and Charlie Wright,

Appellants,

v.

South Carolina Department of Corrections,

Respondent.

Appeal From Richland County
Joseph M. Strickland, Circuit Court Judge

Opinion No. 25860
Heard April 21, 2004 - Filed August 23, 2004

AFFIRMED IN RESULT

Harry Leslie Devoe, Jr., of New Zion, for Appellants.

Lake E. Summers and Vinton D. Lide, both of Vinton D. Lide & Associates, of Lexington, for Respondent.

JUSTICE WALLER: This case involves interpretation of S.C. Code Ann. Sections 24-3-40, 24-3-410, and 24-3-430 (Supp. 2002) (the Prevailing

Wage statutes). Appellants, Inmates confined within the South Carolina Department of Corrections (DOC), instituted this action asserting they were entitled to certain wages pursuant to the statutes. The circuit court ruled the statutes provided no private right of action for Inmates. We affirm in result.

FACTS

Inmates, while housed at Tyger River Correctional Institute, were employed in a Prison Industries/Private Sector Program, for Standard Plywoods, making "Anderson Hardwood Floors." At the time of their initial employment, Inmates were paid a .25 per hour "training wage." After 160 hours, they were paid a .75 per hour "training wage."[1] After completion of 320 hours, Inmates were paid the minimum wage of $5.15 per hour.

Inmates filed this Tort Claims action,[2] maintaining their training wages and hourly wages did not satisfy the Prevailing Wage statute, S.C. Code Ann. § 24-3-430(D);[3] they contended the prevailing wage for work of a similar nature ranged from $9.00-$14.00 per hour, and that DOC's failure to pay wages in accordance with the statute was grossly negligent.

The circuit court ruled the applicable statutes did not give rise to a private cause of action in Inmates. The court further held the DOC was paying Inmates in accordance with the statutes, and that, in any event, Inmates had not established DOC's method of payment was grossly negligent, as required to maintain a Tort Claims action.

ISSUE[4]

Did the circuit court err in holding the Prevailing Wage statutes did not create a private right of action in Inmates?

---

[1] The policy of paying a training wage ended July 1, 1999.

[2] S.C. Code Ann. § 15-78-10 et seq.

[3] Section 24-3-430 (D) provides that "[n]o inmate participating in the program may earn less than the prevailing wage for work of similar nature in the private sector."

[4] In light of our holding, we need not address Inmates' claim that the trial court erred in denying their motion to transfer the case to the jury roster.

DISCUSSION

In 1995, the General Assembly enacted § 24-3-430, authorizing the DOC to use inmate labor in private industry. Section 24-3-430 provides:

> (A) The Director of the Department of Corrections may establish a program involving the use of inmate labor by a nonprofit organization or in private industry for the manufacturing and processing of goods, wares, or merchandise or the provision of services or another business or commercial enterprise considered by the director to enhance the general welfare of South Carolina. . . . Inmates participating in such labor shall not benefit in any manner contradictory to existing statutes.
>
> (B) The director may enter into contracts necessary to implement this program. The contractual agreements may include rental or lease agreements for state buildings or portions of them on the grounds of an institution or a facility of the Department of Corrections and provide for reasonable access to and egress from the building to establish and operate a facility.
>
> (C) An inmate may participate in the program established pursuant to this section only on a voluntary basis and only after he has been informed of the conditions of his employment.
>
> (D) **No inmate participating in the program may earn less than the prevailing wage for work of similar nature in the private sector**.
>
> (E) Inmate participation in the program may not result in the displacement of employed workers in the State of South Carolina and may not impair existing contracts for services.

> (F) Nothing contained in this section restores, in whole or in part, the civil rights of an inmate. No inmate compensated for participation in the program is considered an employee of the State.
>
> (G) No inmate who participates in a project designated by the Director of the Bureau of Justice Assistance pursuant to Public Law 90-351 is eligible for unemployment compensation upon termination from the program.
>
> (H) The earnings of an inmate authorized to work at paid employment pursuant to this section must be paid directly to the Department of Corrections and applied as provided under Section 24-3-40.[5]

Inmates assert the circuit court erred in ruling the "the prevailing wage statute did not create a right to sue for [them] and was not enacted for [their] benefit."

Initially, we note that the DOC's failure to pay a certain wage simply does not constitute a tort so as to be cognizable under the Tort Claims Act. Further, even if this were a Tort Claims case, the circuit court correctly ruled the DOC was immune from liability under S.C. Code Ann. § 15-78-60(5)(governmental entity not liable for loss resulting from the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee). In any event, we agree with the circuit court that the statutes relied upon by Inmates do not give rise to a private, civil cause of action.

The primary consideration in deciding whether a private cause of action should be implied under a criminal statute is legislative intent. Dorman v. Aiken Communications, Inc., 303 S.C. 63, 398 S.E.2d 687 (1990). "The

[5] Section 24-3-40 allows an inmate's wages to be distributed for restitution, child support, purchase of incidentals for the inmate, state and federal taxes, and 10% in an interest bearing account for the benefit of the prisoner.

legislative intent to grant or withhold a private right of action for violation of a statute or the failure to perform a statutory duty, is determined primarily from the language of the statute. . . . In this respect, the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability." Whitworth v. Fast Fare Markets of South Carolina, Inc., 289 S.C. 418, 420, 338 S.E.2d 155, 156 (1985). Where a statute does not specifically create a private cause of action, one can be implied **only if the legislation was enacted for the special benefit of a private party**. Citizens for Lee County v. Lee County, 308 S.C. 23, 416 S.E.2d 641 (1992) (emphasis supplied). Given that the overall purpose of the prevailing wage statute is to prevent unfair competition, and to aid society and the public in general, we cannot conclude that the statutes in question were enacted for the special benefit of Inmates.

Section 24-3-410 is entitled "Sale of prison-made products on open market generally prohibited; penalties." Violation of the statute is a misdemeanor and, upon conviction, a person must be fined not less than two hundred nor more than five thousand dollars or imprisoned for not less than three months nor more than one year, or both. S.C. Code Ann. § 24-3-410(C). Although section 24-3-430 does not specifically set forth criminal penalties, section 24-3-420 states that "Any person who willfully violates any of the provisions of this article other than § 24-3-410 shall be guilty of a misdemeanor and, upon conviction, shall be confined in jail not less than ten days nor more than one year, or fined not less than ten dollars nor more than five hundred dollars, or both, in the discretion of the court." Nothing in the statutes indicates a legislative intent to create civil liability for a violation of the statutes. Accordingly, they do not give rise to a private right of action.[6] Cf., Linder v. Insurance Claims Consultants, Inc., 348 S.C. 477, 560 S.E.2d

[6] The trial court relied upon federal cases interpreting the Ashurst-Sumners Act, 18 U.S.C. § 1761, to support its findings that the prevailing wage statute does not give rise to a private cause of action in inmates. In light of our holding, we need not address federal caselaw. However, we note the trial court's ruling is supported by the caselaw. See Harker v. State Use Industries, 990 F.2d 131 (4th Cir.), *cert. denied* 510 U.S. 886 (1993); McMaster v. Minnesota, 819 F.Supp. 1429 (D. Minn. 1993).

612 (2002) (criminal statutes which prohibit unauthorized practice of law do not give rise to private right of action); Dorman v. Aiken Communications, Inc., 303 S.C. 63, 398 S.E.2d 687 (1990) (construing § 16-3-730, prohibiting publication of name of victim of criminal sexual conduct, as a criminal statute created primarily for the protection of the public, such that it does not create a private right of action).[7]

However, notwithstanding our holding that Inmates have no private civil cause of action, they are not without a remedy. In accordance with the companion case of Wicker v. State, Op. No. 25859 (S.C. Sup. Ct. filed August 23, 2004), we hold Inmates may file an inmate grievance to protest DOC's failure to pay wages in accordance with the mandatory statutory provisions.

AFFIRMED IN RESULT.

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

[7] The concurrence would hold inmates have a private cause of action under the South Carolina Payment of Wages Act. S.C. Code Ann. §§ 41-10-10, *et seq.* (Supp. 2003). However, S.C. Code Ann. § 41-10-80(C) provides that "[i]n case of any failure to pay wages due to an **employee** . . . the **employee** may recover in a civil action." Notably, section 24-3-430 (F) of the Prevailing Wage statute specifically states that **"[n]o inmate compensated for participation in the program is considered an employee of the State**." (emphasis added). In my view, this further evinces a legislative intent not to create a private right of action.

JUSTICE PLEICONES: I agree with the majority that the inmates in this matter do not have a cause of action under the Tort Claims Act. I conclude, however, that the Prevailing Wage Statute[8] was intended for the benefit of the Inmates.[9] Citizens for Lee County v. Lee County, 308 S.C. 23, 416 S.E.2d 641 (1992). In my opinion, the fact that the Legislature provided for the distribution of part of these wages to pay the inmate's legal obligations while incarcerated, and included a provision providing for the return of the wages escrowed for the inmate's benefit upon his release, is evidence that § 24-3-430 was intended for the welfare of the inmate, not the general public. S.C. Code Ann. § 24-3-40 (Supp. 2003). I would hold that an inmate who claims not to have been paid the prevailing wage is entitled to proceed under the South Carolina Payment of Wages Act. S.C. Code Ann. §§ 41-10-10, *et seq.* (Supp. 2003).[10] Accordingly, I concur in the majority's decision upholding the circuit court's dismissal of this Tort Claims suit, but do not join the holding that the inmates' remedy is an administrative grievance.

[8] S.C. Code Ann. § 24-3-430 (Supp. 2003).

[9] I agree that it was also intended for the benefit of private industries whose products or services could be impacted if unfair competition resulted from underpayment of wages to inmate laborers.

[10] Under the Payment of Wages Act, "Employer" is defined to include the employer and that employer's agents. § 41-10-10(1). The Prison Industries Act provides "the employer of a prisoner authorized to work . . . in a prison industry program . . . shall pay the wages directly to the Department of Corrections . . ." and then requires the Department to distribute those wages. § 24-3-40. In my opinion, the Department of Corrections, as agent of the employer, is subject to an inmate's claim made pursuant to the Payment of Wages Act.

The Supreme Court of South Carolina

In the Matter of the Care and
Treatment of Herbert Lee
McCoy, Appellant.

ORDER

Appellant was found guilty of committing a lewd act on a minor. He was subsequently found to be a sexually violent predator pursuant to the South Carolina Sexually Violent Predator Act (SVP Act),[1] and was involuntarily committed to the South Carolina Department of Mental Health.

Thereafter, appellant filed a notice of appeal. Counsel for appellant, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), and Ex Parte Cauthen, 291 S.C. 465, 354 S.E.2d 381 (1987), filed an affidavit with the Court stating he found no basis for appellant's allegations in the record and that he felt the appeal had no merit. Counsel attached a copy of the transcript and asked the Court to review it for any meritorious issue.

The State filed a motion to strike the affidavit stating that, while

[1] S.C. Code Ann. §§ 44-48-10 to -170 (2003).

counsel's conclusion that the appeal lacked merit was correct, there is no authorized procedure for filing an affidavit in lieu of a brief and designation of matter as required by the South Carolina Appellate Court Rules. The State argues there is no authority to solely submit an affidavit in sexually violent predator cases, but states it has no objection to the Court establishing a procedure for such a practice.

Thereafter, counsel for appellant filed a "Memorandum of Issues of Colorable Merit" alleging two errors of the trial court. Counsel also filed a return to the State's motion to strike his affidavit. Therein, counsel outlines the trial proceeding and why appellant's appeal lacks merit. Counsel also explains the authority he relied upon in filing the transcript and affidavit, and requests the Court institute a procedure for filing no-merit appeals in regards to the involuntary commitment of sexually violent predators.

Although a person committed under the SVP Act has no Sixth or Fourteenth Amendment right to counsel, as does an accused in a criminal proceeding, they do have a statutory right to counsel. S.C. Code Ann. § 44-48-90 (2003). We have adopted a no-merit procedure in the post-conviction relief context in Johnson, supra, and feel it is appropriate to do so here, as

well. Accordingly, we hereby adopt an Anders-type procedure, as we did in Johnson, supra, for alleged no-merit SVP involuntary commitment appeals. Therefore, the motion to strike the affidavit is granted. In addition, counsel is instructed to withdraw his "Memorandum of Colorable Issues of Merit" and submit in its place a brief, pursuant to Anders, supra, outlining all issues of arguable merit, a copy of the record on appeal, and a motion to be relieved as counsel. This will be the procedure for all future cases involving alleged no-merit SVP involuntary commitment appeals.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

August 23, 2004

The Supreme Court of South Carolina

In the Matter of
Warren Stephen Curtis, Petitioner.

ORDER

On July 14, 2003, petitioner was suspended from the practice of law for two years, retroactive to June 17, 2002, the date of his interim suspension. In the Matter of Curtis, 355 S.C. 45, 583 S.E.2d 755 (2003). Petitioner has now filed a petition for reinstatement.

The Committee on Character and Fitness (the Committee) recommends the Court grant the petition subject to two conditions. One of the conditions addresses quarterly hair and urine drug tests; the other addresses appointment of a mentor.

The Court grants the petition for reinstatement subject to the following conditions:

1. Petitioner shall submit to quarterly hair and urine drug tests for a period of two (2) years. The tests shall be performed by a laboratory approved by the Office of Disciplinary Counsel (ODC) and the cost of these tests shall be borne by petitioner. The results of these tests shall be provided to the ODC, and

the ODC shall immediately report any test results that indicate the use of drugs.

2. Petitioner shall participate in a mentoring program for two (2) years. The mentor shall assist petitioner both in his law practice and with his drug rehabilitation. The mentor must be an attorney who is approved by both the ODC and Lawyers Caring About Lawyers. Petitioner shall meet with the mentor as often as the mentor shall require, but not less than once every ninety (90) days. The mentor shall submit a report regarding petitioner's progress to the ODC after each meeting with petitioner. Petitioner shall reimburse the mentor for any costs incurred by the mentor in monitoring petitioner. In the event petitioner fails to cooperate with the mentor or make satisfactory progress, the ODC shall immediately notify this Court.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

Pleicones, J., not participating

Columbia, South Carolina

August 20, 2004

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Key Corporate Capital, Inc., National Tax Assistance Corporation, TransAm Tax Certificate Corporation d/b/a Destiny 98TD, Advantage 99TD, TA Escrow 97 and Destiny 98, Respondents,

v.

County of Beaufort, Treasurer of Beaufort County and Tax Collector of Beaufort County, Appellants.

Appeal From Beaufort County
Thomas Kemmerlin, Jr., Master-in-Equity

Opinion No. 3857
Heard June 23, 2004 – Filed August 16, 2004

AFFIRMED

David S. Black and Mary Bass Lohr, both of Beaufort, for Appellants.

James Howarth Ritchie, Jr., of Spartanburg, for Respondents.

HEARN, C.J.: This case arises from numerous voided tax sales of real property in Beaufort County. After the sales were voided, the County returned the purchase prices to the successful bidders but refused to return the interest the money had earned. The bidders sued and, under a theory of restitution, were awarded an amount equal to the interest earned by Beaufort County during the time it held the bidders' money. The County appeals. We affirm.

FACTS

Key Corporate Capital, Inc., National Tax Assistance Corporation, and TransAm Tax Certificate Corporation ("bidders") purchased a number of properties at Beaufort County tax sales in 1998 and 1999. The Beaufort County Treasurer voided twelve of these tax sales pursuant to the authority vested in the Treasurer by section 12-51-150 of the South Carolina Code (2000). The voiding of the tax sales resulted solely from the actions or inactions taken by Beaufort County and its agents. Specifically, the Treasurer discovered a series of "errors, oversights, and/or miscommunications within the Beaufort County offices, meaning the Treasurer's Office and/or the Auditor's Office." These errors included "a deed recording error resulting in an invalid notice to the defaulting taxpayer," a failure to accurately credit the payment of delinquent taxes, and "a flaw with regard to statutory notice to the delinquent taxpayer."

When the tax sales were voided by the County of Beaufort, Treasurer of Beaufort County, and Tax Collector of Beaufort County ("the County"), the amounts paid for the properties were refunded to the bidders. However, the County retained the purchase price on each property for at least thirty days, and in some cases, the County held the purchase price for over a year.

The County actually accrued $28,010.93 in interest by holding the monies involved in these voided tax sales. The bidders sued the County,

arguing that in addition to recouping the amount of their bid, they should also receive the interest their money earned while in the County's possession. The master-in-equity agreed and ruled that under a theory of restitution, the bidders were entitled to the actual interest earned by the County prior to the return of the purchase price. We affirm.

STANDARD OF REVIEW

"When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." Kiriakides v. Atlas Food Sys. & Servs., Inc., 338 S.C. 572, 580, 527 S.E.2d 371, 375 (Ct. App. 2000) (quoting Corley v. Ott, 326 S.C. 89, 92 n.1, 485 S.E.2d 97, 99 n.1 (1997). "In an action at equity, this court can find facts in accordance with its view of the preponderance of the evidence." West v. Newberry Elec. Co-op., 357 S.C. 537, 542, 593 S.E.2d 500, 502 (Ct. App. 2004). "In an action at law, tried without a jury, the appellate court standard of review extends only to the correction of errors of law." Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C., 353 S.C. 327, 334, 577 S.E.2d 468, 472 (Ct. App. 2003).

LAW/ANALYSIS

The County first argues that section 12-51-150 of the South Carolina Code (2000), which governs voided tax sales, compels our court to allow the County to retain the interest while holding a successful bidder's money. We disagree.

Section 12-51-150 states:

> In the case that the official in charge of the tax sale discovers before a tax title has passed, the failure of any action required to be properly performed, the official may void the tax sale and refund the amount paid to the successful bidder.

The County argues that because this section only addresses the return of the purchase price upon the voiding of a tax sale, the statute allows the County to keep the interest earned on the money. However, we do not believe the statute's silence on the subject entitles the County to retain the interest.

In contrast to section 12-51-150's silence, other code sections relevant to tax sales address which party is entitled to interest in certain situations. For instance, under section 12-51-130, *the County* is "entitled to the earnings for keeping the overage [amount paid at auction greater than the amounts owed by delinquent taxpayer]." S.C. Code Ann. § 12-51-130 (Supp. 2003). Section 12-51-100, however, provides that *a successful bidder* is entitled to receive interest on the bid price in the event the property is redeemed. S.C. Code Ann. § 12-51-100 (2000). Because other statutes are explicit about which party is entitled to keep interest on bid prices from tax sales, the silence of section 12-51-150 does not, by itself, indicate the Legislature's intent.

The County also argues that, because section 12-51-150 does not specifically grant bidders the right to recoup the interest the County earns on their money, the County is entitled to the interest pursuant to the supreme court's decision in Red Oak Lands, Inc. v. Lane, 268 S.C. 631, 235 S.E.2d 718 (1977). We disagree.

In the Red Oak Lands case, a corporation (Red Oak) bought property at a tax sale but was later divested of title to that property. Red Oak sued the tax collector for the damages it sustained from this divestment pursuant to sections 65-2782 through 65-2785 of the South Carolina Code (1962), which entitled a divested tax sale purchaser to a lien on the property for the amount paid at the tax sale or to recover that amount directly from the taxing authority. These statutes, however, required the divested tax sale purchaser to bring suit against the taxing authority within two years of the sale. Id. at 634, 235 S.E.2d at 720.

The trial court found that Red Oak failed to state facts sufficient to constitute a cause of action. Id. at 632-633, 235 S.E.2d at 719. On appeal,

Red Oak argued, among other things, that the trial court erred in refusing to grant its request to replead. Specifically, Red Oak wanted to amend its complaint to include a common law action for the tax collector's misfeasance related to the sale. The supreme court found the statutory remedy provided to tax sale purchasers was exclusive, and therefore "it would be a futile gesture to grant Red Oak the right to replead" because the two-year limitation period provided by Section 65-2785 had expired. Id. at 636, 235 S.E.2d at 720.

The Red Oak Lands court held that the exclusive remedy for recovery of the purchase price of a tax sale was the remedy provided by statute. However, unlike Red Oaks, the bidders in this case are not attempting to assert a common law cause of action against the County for recovery of the purchase price *in addition to* the cause of action provided by statute. Instead, the bidders acknowledge that their only relief stems from section 12-51-150. However, they argue that because section 12-51-150 is silent regarding which party is entitled to the interest, we should consider the rules of equity when interpreting the statute and find that the statute's requirement that the County return the bid price implicitly directs the County to return actual interest earned as well. We agree.

Equity is reserved for situations when there is no adequate remedy at law. Santee Cooper Resort, Inc. v. South Carolina Pub. Serv. Comm'n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). For a court to justify refusing to exercise equity, the remedy at law must be adequate. Chisolm v. Pryor, 207 S.C. 54, 60, 35 S.E.2d 21, 24 (1945). Furthermore, "[i]t is not enough that there is some remedy at law, but that remedy must be as practical, efficient, and prompt as the remedy in equity." Id.

In this case, no adequate legal remedy exists. Section 12-51-150 requires the return of the purchase price, but is silent as to any interest earned. Without resorting to equitable remedies, no remedy exists to prevent the County from reaping a benefit from its own mistakes.

The County argues that, pursuant to Santee Cooper Resort, Inc. v. South Carolina Public Service Commission, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989), "[t]he court's equitable powers must yield in the face of an

unambiguously worded statute." However, in Santee Cooper Resort, Inc., the supreme court found an adequate legal remedy existed when it was confronted by clear "statutory alternatives adequately enabl[ing] the Consumer Advocate to achieve the goal of consumer protection." Id. This is in sharp contrast to the case at hand. Here, the statute contains no statutory provision addressing the issue of interest, and without resorting to equity, no remedy would exist. It is an equitable maxim that "[e]quity will not suffer a wrong without a remedy." Lane v. New York Life Ins. Co., 147 S.C. 333, 369, 145 S.E. 196, 207 (1928); see also State ex rel. Daniel v. Strong, 185 S.C. 27, 43, 192 S.E. 671, 678 (1937) ("[E]quity abhors a wrong without a remedy."). Where, as here, a wrong has been suffered, and no adequate legal remedy exists, it is well within the court's powers to fashion an equitable remedy.

In this case, the master-in-equity used the equitable remedy of restitution to disgorge from the County the interest it earned on the bidders' money. In order to recover under a theory of restitution, the bidders must show: (1) they conferred a non-gratuitous benefit on the County; (2) the County realized some value from the benefit; and (3) it would be inequitable for the County to retain the benefit without paying the bidders for its value. Sauner v. Pub. Serv. Auth. of South Carolina, 354 S.C. 397, 409, 581 S.E.2d 161, 167 (2003).

In the case at hand, the bidders clearly meet the first two elements of restitution: (1) the bidders paid for real property expecting to gain title; and (2) the County received $28,010.93 in interest while holding the bidders' money. As to the third element, the County argues that no inequity occurred because a clear and disclosed term of the tax sale was that, in the event the sale was voided, the bidder would not receive interest on the bid price. Importantly, however, the County never argued that this notice estops the bidders from claiming that they are entitled to interest. Furthermore, we do not believe that the bidders should be precluded from pursuing their equitable entitlement to interest merely because the County, apparently relying on section 12-51-150's silence, notified bidders that no interest would be awarded in the event the sale was voided.

Balancing all the equities, we find that, in spite of the County's notice to bidders, it would be unjust to allow the County to keep the interest on the purchase prices of tax sales that were voided due to the County's own errors and omissions. To reward the County for its own internal errors would discourage the County from carefully conducting tax sales. Further, because the amount of interest earned is determined in part by the amount of time the County retains a bidder's purchase price, the County would have little incentive to promptly return the bidder's money after a tax sale is voided. Thus, equity dictates that bidders, not the County, are entitled to the interest their money actually earns while in the possession of the County when a tax sale is voided.

Accordingly, the master-in-equity's decision to award $28,010.93 in restitution is

AFFIRMED.

STILWELL, J. and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Charlotte O'Braitis, Appellant,

v.

Catheryne Ruth O'Braitis, Respondent.

Appeal From Richland County
Joseph M. Strickland, Master-In-Equity

Opinion No. 3858
Heard June 8, 2004 – Filed August 16, 2004

AFFIRMED

Clinch H. Belser, Jr. and Michael J. Polk, both of Columbia, for Appellant.

Demetri K. Koutrakos, of Columbia, for Respondent.

HEARN, C.J.: Charlotte O'Braitis brought this action seeking the partition of real property and an accounting for rents and profits against her sister, Catheryne Ruth O'Braitis, alleging Catheryne ousted her from a

piece of real property the two parties own. Charlotte appeals the trial court's order granting the partition but denying her request for expenses and rents caused by Catheryne's alleged ouster. We affirm.

FACTS

Charlotte and Catheryne's father passed away on April 19, 1997, and left his home to his four children in equal shares. Two of the siblings gave their share of the property to Catheryne, who had lived in the home assisting her father since 1983. Charlotte, who resides in California, retained her one-quarter share of the property.

Upon learning of her father's death, Charlotte and her domestic partner, Dr. Weissman, visited the subject property for the first time since 1983. The day after her father's funeral, Charlotte and Dr. Weissman began going through the home in order to find Charlotte's personal belongings. While they attempted to find her things, Charlotte testified that her siblings hovered over her and that her brother became verbally abusive and confrontational. Because of her brother's behavior, Charlotte called the sheriff's office. The officer, acting on his own volition and without any instruction from Catheryne, ordered Charlotte and Dr. Weissman off of the property and issued a trespassing warrant under which Charlotte and Dr. Weissman were not allowed on the property for six months.

Approximately one year later, Charlotte and Dr. Weissman visited the property for the purpose of reviewing personal property of her father's estate. Charlotte testified that Catheryne did not welcome her on the property; however, the evidence shows that Catheryne did not deny Charlotte access to the property.[1]

[1] Certain incidents did occur, however, which made Charlotte feel threatened. For instance, Charlotte and Catheryne's brother "goose-stepped" around the outside of the house with a pellet gun slung over his shoulder and a Nazi flag on his back in front of Dr. Weissman, who is Jewish.

In September 1998, Charlotte and Dr. Weissman returned to the property again for the purpose of reviewing personal property of the estate. During this visit, Catheryne hired a Richland County police officer to keep things under control. The officer testified that Charlotte walked into the house without knocking and went through the personal property without supervision.

In April 1999, Charlotte filed an action against her siblings in probate court, seeking an accounting, termination of the appointment of the personal representative, and other relief. In the probate action, Charlotte alleged Catheryne interfered with and obstructed her right to enter the subject property and sought to recoup money she spent on attorney's fees and other expenses incurred during the probate of her father's estate. The parties later entered into an agreement pursuant to section 62-3-912 of the South Carolina code, and the probate court action was then dismissed with prejudice on June 1, 2000, pursuant to an order of dismissal to which all parties consented.

On August 4, 2000, Charlotte brought this action for a partition and an accounting of rents and profits based on Catheryne's ouster of her from the property. Catheryne asserted counterclaims for partition and accounting and alleged Charlotte's claims were barred by res judicata. The case was referred to the master-in-equity. The master issued an order granting partition, denying compensation for ouster, and allowing Catheryne to purchase Charlotte's portion of the property for the net price (after offsets) of $2,264.31. Charlotte filed a motion to reconsider, which the master denied. This appeal followed.

STANDARD OF REVIEW

A partition action, as well as an action for accounting, is an action in equity. In an appeal from an equitable action, this court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. Doe v. Clark, 318 S.C. 274, 276, 457 S.E.2d 336, 337 (1995). However, this broad scope of review does not require this court to disregard the findings at trial or ignore the fact that the trial judge was in a better

position to assess the credibility of the witnesses. Dorchester County Dep't of Soc. Servs. v. Miller, 324 S.C. 445, 452, 477 S.E.2d 476, 480 (Ct. App. 1996).

LAW/ANALYSIS

I. Ouster

Charlotte first argues the master erred in finding that Catheryne was not obligated to pay the expenses she incurred and the rent that she lost during the time she was allegedly ousted from the property. We disagree.

"'Ouster' is the actual turning out or keeping excluded a party entitled to possession of any real property." Freeman v. Freeman, 323 S.C. 95, 99, 473 S.E.2d 467, 470 (Ct. App. 1996). "By actual ouster is not meant a physical eviction, but a possession attended with such circumstances as to evince a claim of exclusive right and title and a denial of the right of the other tenants to participate in the profits." Woods v. Bivens, 292 S.C. 76, 80, 354 S.E.2d 909, 912 (1987). Freeman provides:

> The acts relied upon to establish an ouster must be of an unequivocal nature, and so distinctly hostile to the rights of the other cotenants that the intention to disseize is clear and unmistakable. Only in rare, extreme cases will the ouster by one cotenant of other cotenants be implied from exclusive possession and dealings with the property, such as collection of rents and improvement of the property.

323 S.C. at 99, 473 S.E.2d at 470 (citation omitted).

Charlotte argues that Catheryne ousted her from the property by (1) refusing to give her a key to the property;[2] (2) not allowing her unfettered

[2] Charlotte claims she repeatedly requested a key to the house after her father's death in 1997, but Catheryne never gave her one. Catheryne

access to the property; and (3) acquiescing in the trespass warrant issued by the police officer. Charlotte contends these actions closely resemble those of the defendant in Parker v. Shecut, 349 S.C. 226, 562 S.E.2d 620 (2002). In Parker, a sister brought suit against her brother alleging he ousted her from a beach house they inherited jointly from their mother. The supreme court found an ouster had occurred based on evidence that the brother changed the locks to the house, refused to give his sister a working key, and otherwise denied his sister access to the property. Id. at 230-31, 562 S.E.2d at 623.

We find the present case differs significantly from Parker. It is uncontested that Catheryne allowed Charlotte access to the property every time she visited. In fact, on all three of Charlotte's visits to the property, she and Dr. Weissman walked freely through the house, looking at and going through personal property. According to the police officer, when Charlotte and Dr. Weissman arrived for the September 1998 visit, "[t]hey came to the front door, just walked straight on in, no knock at all, whatsoever." The officer also stated they "went around the house by themselves" and "were going through every bit of the property." This is hardly a denial of access to the property.

Furthermore, any acquiescence by Catheryne in the trespass warrant of April 1997 is not enough to support a finding of ouster. It is important to note that Charlotte, not Catheryne, was the one who called an officer to the scene when the altercation ensued between Charlotte and her siblings. Because Charlotte enlisted the help of an outside party to settle the dispute, she cannot now attribute the effect of the trespass warrant to Catheryne. Based on all the above, we find Catheryne's actions toward Charlotte do not amount to ouster.

Not only do we hold no ouster occurred, we also hold Charlotte's claim for an accounting is barred by res judicata, or more specifically, issue preclusion. Under the doctrine of issue preclusion, if an issue of fact or law

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explained that she did not give Charlotte a key because the estate had not yet been settled and every time Charlotte was in the house something was broken.

was actually litigated and determined and necessary to a valid and final judgment, the determination is conclusive in a subsequent action on that claim or a different claim. Carman v. S.C. Alcoholic Beverage Control Comm'n, 317 S.C. 1, 6, 451 S.E.2d 383, 386 (1994).

Here, Charlotte filed a petition in probate court seeking an accounting for the attorney's fees and expenses she incurred while traveling between California and South Carolina. Charlotte also alleged in the probate court action that she was entitled to rent from Catheryne because Catheryne interfered with her right to enter the property. Thus, in the probate court action, just as in the present action, Charlotte sought the expenses she incurred and the rent she lost during the time she was allegedly denied access to the property. In fact, Charlotte even admitted while testifying in the present action that she had filed a complaint against Catheryne in probate court raising the same issues that she raises in this action.

The probate court dismissed the action with prejudice pursuant to an order of dismissal to which the parties consented. A dismissal with prejudice acts as an adjudication on the merits and therefore precludes subsequent litigation just as if the action had been tried to a final adjudication. Jones v. City of Folly Beach, 326 S.C. 360, 366, 483 S.E.2d 770, 773 (Ct. App. 1997). In a subsequent action involving the same subject matter, the dismissal finally settles all matters litigated in the earlier proceedings, and all matters which might have been litigated therein. Nunnery v. Brantley Constr. Co, 289 S.C. 205, 209, 345 S.E.2d 740, 743 (Ct. App. 1986). Because Charlotte raised the same issue in the probate action and that issue was necessary to and determined in an adjudication on the merits, she is precluded from raising the issue again in this action.

Charlotte attempts to make a distinction between the issues raised to the probate court and the trial court by arguing that, in the probate court action, she sought access to the subject property for the purpose of inspecting the personal property only because that is the only relief available in Probate Court. We find this argument unconvincing.

> It is a fundamental principle of jurisprudence that material facts or questions which were directly in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action between the same parties or their privies, regardless of the form that the issue may take in the subsequent action.
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> . . .
>
> The rule will also apply even though the subsequent action is upon a different cause of action, and involves a different subject matter, claim, or demand, than the earlier action. In such cases, it is likewise immaterial that the two actions have a different scope, or are based on different grounds, or are tried on different theories, or are instituted for different purposes, and seek different relief.

46 Am. Jur. 2d Judgments § 539 (1994) (emphasis added).

Therefore, Charlotte's argument that, in the probate action, she only sought access to the property for the purpose of inspecting personal property is not enough to allow her present claim for ouster to go forward. In addition, this distinction fails because Charlotte testified that all her visits to the property were for the purpose of inspecting personal property. She cannot now claim that she wanted access to the property for any other reason than to inspect the personal property of her father's estate. It is clear that she raised the same issue in both the probate court and the trial court. Therefore, Charlotte's claim that she is due an accounting based on Catheryne's ouster is barred by res judicata.

II. Trial Court's Calculation of the Net Price for Charlotte's Share of the Property

Charlotte next argues the trial court incorrectly calculated the net price Catheryne should pay for Charlotte's share of the property by crediting Catheryne for the amount the property increased in value due to Catheryne's

improvements to the property. We find the trial court correctly determined the net price.

Catheryne spent approximately $9,859.80 in making improvements to the property, such as renovating the living room, dining room, and the kitchen. Catheryne testified that due to the improvements, the property increased in value from $53,000 to $55,000. Charlotte argues Catheryne should not receive credit for the $2,000 increase because Catheryne made these improvements unilaterally, and thus, at her own risk. It is immaterial that Catheryne made these improvements without Charlotte's consent. As our court explained in Ackerman v. Heard:

> The general rule is that a joint tenant who, at his own expense, places permanent improvements upon the common property is entitled in a partition suit to compensation for the improvements whether his cotenants assented thereto or not. Compensation is allowed not as a matter of legal right but purely from the desire of a court of equity to do justice and to prevent the one tenant from becoming enriched at the expense of another. In the absence of consent, which we did not have in the case before us, the amount of compensation is estimated by and limited to the amount by which the value of the common property has been enhanced.

287 S.C. 626, 628-29, 340 S.E.2d 560, 562 (Ct. App. 1986) (emphasis in original). Because the improvements to the property increased the value of the property by $2,000, the trial court properly gave Catheryne $2,000 in credit. While we agree with the trial judge's decision to reimburse Catheryne for the improvements to the property, we point out a clarification in the amount Catheryne must pay Charlotte. The trial judge's order misstated the amount of increase in value to be $2,500, but his later order denying Charlotte's motion to reconsider corrected the error. However, the trial court did not specifically correct the net price to be paid to Catheryne based on an increase in value of $2,000. To clarify this issue for the parties, we find that Catheryne must pay Charlotte $2,764.31 for her share of the property based on an increase in the fair market value of the property of $2,000, and taking

into consideration the trial court's calculations for taxes, insurance, and attorney's fees.

III. Attorney's Fees

Charlotte claims the trial court erred in awarding attorney's fees to Catheryne because Charlotte was required to bring this action based on Catheryne's ouster. We disagree.

The determination of whether to award attorney's fees in partition actions rests within the sound discretion of the trial court. S&W Corp. of Inman v. Wells, 283 S.C. 218, 220, 321 S.E.2d 183, 185 (Ct. App. 1984). The trial court may "fix attorneys' fees in all partition proceedings and, as may be equitable, assess such fees against any or all of the parties in interest." S.C. Code Ann. § 15-61-110 (Supp. 1976).

Although Charlotte argues she was required to bring this partition action because of Catheryne's ouster, as discussed above, no ouster occurred. Moreover, Catheryne was forced to defend allegations that were previously raised and dismissed with prejudice in the probate court action. Based on the above, and giving deference to the trial court, we find the award of attorney's fees was proper.

CONCLUSION

For the foregoing reasons, the decision of the trial court is

AFFIRMED.

STILWELL, J. and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Stark Truss Co., Inc., Respondent,

v.

Superior Construction Corporation and National Fire Insurance Company of Hartford, Appellants.

Appeal From Laurens County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 3859
Submitted March 8, 2004 – Filed August 16, 2004

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

A. Cruickshanks, IV, of Clinton; and Steele B. Windle, III, of Charlotte, for Appellants.

Paul B. Zion, of Spartanburg, for Respondent.

CURETON, A.J.: Superior Construction Corporation and National Fire Insurance Company of Hartford (collectively, "Appellants") appeal the circuit court's order denying their motion to set aside an entry of default judgment and dismissing their counterclaims against Stark Truss Co., Inc. We affirm in part, reverse in part and remand.

FACTS

In 2001, Superior signed a purchase order agreement under which Stark Truss was to manufacture and deliver all the roof trusses Superior needed to complete a school construction project for the amount of $95,861. National issued Superior a labor and materials payment bond on the project. A dispute arose between Superior and Stark Truss concerning the condition of the trusses provided. Superior refused to pay in full for the materials, and Stark Truss refused to deliver the remaining materials without full payment. Superior obtained replacement materials from another supplier. In June 2002, Stark Truss filed a $49,799 payment bond claim with National for the remaining balance of the purchase order price. National denied Stark Truss's claim on the basis of the existence of a bona fide dispute.

On July 12, 2002, Stark Truss filed a summons and complaint against Appellants for the remaining balance plus interest. The summons and complaint were served upon Superior on July 24 and upon National on July 26. National gave its defense in the matter to Superior on August 5, 2002, apparently intending for Superior to answer on its behalf.

Superior did not send a copy of Stark Truss's summons and complaint or National's suit papers to its attorneys until September 5, 2002. Upon receipt that same morning, Appellants' attorneys immediately telephoned Stark Truss's attorneys and requested an extension of time in which to file an answer. Later that day, Appellants' attorneys were contacted by one of Stark Truss's attorneys and informed that default proceedings had already begun, with the

motion for entry of default judgment and affidavit of default being mailed that morning prior to the initial call. Stark Truss denied the request for an extension.

The Appellants' joint answer and counterclaim for damages in excess of $75,000 was prepared, filed with the court on September 6, 2002, and served on Stark Truss. Stark Truss's affidavit of default, motion for entry of default judgment, and a proposed order directing entry of default judgment, dated September 5, 2002, were received and filed five days later on September 11, 2002. Based on Stark Truss's motion, the court issued an order, without a hearing, simultaneously granting entry of default and a default judgment against Appellants.

On September 12, Stark Truss served on Appellants' attorneys its motion to dismiss Appellants' counterclaims, asserting the compulsory claims were barred by the default judgment. Appellants filed a "Motion to Set Aside Entry of Default Judgment" on October 22, 2002, in which Appellants argued both the entry of default and default judgment should be set aside. At the motions hearing, Appellants argued that because they filed an answer and counterclaim prior to the court's receipt of the motion for entry of default and default judgment, they had appeared in the matter, rendering the facts supporting the motion for default judgment inaccurate. Appellants also asserted that because they had appeared, entry of default was improper and required the entry of default judgment to be set aside. Appellants' attorney informed the circuit court that there was no good explanation for not filing an answer within thirty days, other than the fact that Superior's president was "struggling with some depression and a lot of things slipped through his fingers."

On November 15, 2002, the circuit court issued an order holding that Appellants had failed to present sufficient proof of either "good cause" for relief from default under Rule 55(c), SCRCP, or "mistake, inadvertence, surprise, or excusable neglect" under Rule 60(b), SCRCP sufficient to vacate the entry of default judgment. Since the counterclaims were compulsory and the answer was not timely filed,

the court also granted Stark Truss's motion to dismiss all counterclaims. This appeal followed.

STANDARD OF REVIEW

The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge. Thompson v. Hammond, 299 S.C. 116, 119, 382 S.E.2d 900, 902-903 (1989); Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 502 (Ct. App. 1989). This decision will not be reversed absent an abuse of that discretion. Thompson, 299 S.C. at 119, 382 S.E.2d at 902-903; In Re Estate of Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997). An abuse of discretion occurs when the order was controlled by an error of law or when the order is without evidentiary support. Id.

LAW / ANALYSIS

A.

Appellants argue the circuit court erred in entering default and in refusing to set aside the entry of default because they appeared in the matter by filing their answer and counterclaim prior to the filing of the motion for entry of default. We disagree.

A determination in this case requires an evaluation of Rule 55, SCRCP regarding default judgments. When interpreting a court rule, "we apply the same rules of construction used in interpreting statutes. Therefore, the words of [the rule] must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule." Green v. Lewis Truck Lines, Inc., 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994). When the language of a court rule is clear and unambiguous, the court is obligated to follow its plain and ordinary meaning.

Unless an extension is granted, a defendant must serve his answer within thirty days "after the service of the complaint upon him." Rule 12(a), SCRCP. If a party has failed to "plead or otherwise defend[1] as provided by [the South Carolina Rules of Civil Procedure] and that fact is made to appear by affidavit or otherwise," the clerk of court will enter default. Rule 55(a), SCRCP. Entry of default is a ministerial act which a clerk is required to perform once default is made to appear by the affidavit of the moving party. See Thynes v. Lloyd, 294 S.C. 152, 153-54, 363 S.E.2d 122, 123 (Ct. App. 1987) (holding that "whether default was actually entered is of no consequence since the entry of default is a purely ministerial act which the clerk was required to perform once the default was made to appear by the affidavit" of the moving party).

Appellants initially argue the circuit court erred in entering default. Although Appellants' late answer amounted to a "pleading" filed prior to entry of default, it did not comply with the time requirements of Rule 12(a), SCRCP. Appellants clearly failed to file an answer within thirty days of service of the summons and complaint upon them and they were technically in default. Thus, Appellants' answer was not a valid pleading or defense "as provided by" the Rules of Civil Procedure. A plain reading of Rule 55(a) allows entry of default when a pleading or defense is asserted in a manner noncompliant with the Rules of Civil Procedure. To hold otherwise would render the requirements in Rule 12(a), SCRCP, meaningless. We find the court's entry of default was proper.

Appellants point to cases from other jurisdictions holding that entry of default is improper if even a late answer is filed prior to entry of default. See, e.g., Moore v. Sullivan, 473 S.E.2d 659, 660 (N.C. Ct.

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[1] "The words 'otherwise defend' refer to the interposition of various challenges to such matters as service, venue, and the sufficiency of the prior pleading, any of which might prevent a default if pursued in the absence of a responsive pleading." 10A Charles Allen Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2682, at 16-17 (3rd ed. 1989).

App. 1996) ("After an answer has been filed, even if the answer is untimely filed, a default may not be entered."). That is not the current law in this state. Further, filing a late answer would not alter the fact that Appellants were in default, especially if entering default is a ministerial act to be automatically performed once an affidavit shows the defendant has failed to comply with the requirements of the rules. Thynes, 294 S.C. at 153-54, 363 S.E.2d at 123.

Appellants also argue the circuit court erred in denying their motion to set aside the entry of default. We disagree.

Rule 55(c), SCRCP, allows the circuit court to set aside an entry of default "for good cause shown." Rule 55(c), SCRCP. "In deciding whether good cause exists, the trial court should consider the following factors: (1) the timing of the defendant's motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." Pilgrim v. Miller, 350 S.C. 637, 640, 567 S.E.2d 527, 528 (Ct. App. 2002), cert. dismissed (April 25, 2003). Whether to grant relief from entry of default is a decision within the sound discretion of the circuit court. Wham, 298 S.C. at 465, 381 S.E.2d at 502. In reviewing the court's exercise of discretion, the issue before the appellate court is not whether it believes good cause existed to set aside the default, "but rather, whether the [trial judge's] determination is supportable by the evidence and not controlled by an error of law." Pilgrim, 350 S.C. at 640-41, 567 S.E.2d at 528.

Appellants' motion for relief from entry of default was filed over a month after the circuit court entered default judgment. They argued that the entry of default should be set aside because they appeared prior to entry of default. The attorney for Appellants informed the circuit court that Superior's president had no good reason, other than depression, for failing to act when he was served with the summons and complaint. The attorney did not give any reason for National's failure to serve and file its answer to the summons and complaint. Based on these facts, we find there was evidence to support the circuit court's refusal to set aside the entry of default.

B.

Appellants argue that because they filed a late answer, they made an "appearance" in the action and entry of default judgment was improper. They further argue that the circuit court erred in refusing to set aside the default judgment. We agree.

Rule 55(b)(1), SCRCP, entitled "Cases Involving Liquidated Damages or Sum Certain," provides that where the amount sought is a sum certain and the defaulting party has not made an appearance, the judge may enter default judgment for the amount sought without holding a hearing. Rule 55(b)(2), entitled "All Other Cases," provides, in pertinent part, that a party who has "appeared" in the action is entitled to notice and a hearing before judgment by default may be entered. A party may seek relief from a default judgment for mistake, inadvertence, newly discovered evidence, fraud or other misconduct, where the judgment is void, or where the judgment has been satisfied. Rule 60(b), SCRCP.

Whether Appellants' late answer amounted to an "appearance" in this case is a critical question. This court has previously discussed whether a late filing constitutes an "appearance." In Dymon v. Hyman, 305 S.C. 170, 406 S.E.2d 388 (Ct. App. 1991), the defendant filed and served his answer late, and the plaintiff acknowledged service of the late answer. However, the plaintiff informed the defendant that he considered the defendant to be in default. Two months later, the plaintiff sought and obtained a judgment by default without giving notice to the defendant. The defendant learned of the default judgment months later, and the circuit court denied the motion for relief from judgment. Interpreting the prior version of Rule 55(b)(1),[2] this court

[2] The prior version of Rule 55(b)(1) is nearly identical to the current version of Rule 55(b)(2). The rules were amended in 1998 to add the version of Rule 55(b)(1) concerning default judgments with liquidated damages and where the defaulting party has failed to appear. The former Rule 55(b)(1) became Rule 55(b)(2). See Rule 55, SCRCP Notes to 1998 Amendments.

held that the defendant's late answer was an "appearance" and thus the defendant was entitled to notice and a hearing on the motion for default judgment. Because no notice was given, this court reversed the circuit court's refusal to set aside the void judgment. Dymon, 305 S.C. at 171, 406 S.E.2d at 389.

Appellants in the present case clearly filed their answer and counterclaims more than thirty days after they were served with the summons and complaint. However, as in Dymon, Appellants' late answer, filed before Stark Truss's motions were received by the circuit court, constituted an appearance in the matter. Appellants were entitled to notice and a hearing before judgment by default was entered. Dymon, 305 S.C. at 171-72, 406 S.E.2d at 389. Because no notice was given and no hearing was held, the default judgment was void. The circuit court erred in refusing to relieve Appellants from the void judgment. Id.; see also Rule 60(b)(4), SCRCP ("On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding [where] . . . the judgment is void.").

C.

Appellants assert the circuit court erred in granting Stark Truss's motion to dismiss their counterclaims as compulsory. We disagree.

The circuit court found, and Appellants do not dispute, that the counterclaims asserted with the late answer were compulsory. Rule 13(a), SCRCP, provides that compulsory counterclaims must be asserted along with a responsive pleading. As Appellants were in default and failed to timely file and serve their answer, they also failed to timely assert their counterclaims. In this instance, we find the circuit court did not err in dismissing the Appellants' counterclaims.

CONCLUSION

Appellants failed to timely serve and file their answer and compulsory counterclaims on Stark Truss pursuant to the Rules of Civil Procedure. Thus, the entry of default was proper, the circuit court's refusal to set aside the entry of default was supported by the evidence, and the dismissal of Appellants' compulsory counterclaims was proper. However, as Appellants made an appearance in this action by filing a late answer, they were entitled to notice before entry of default judgment. The circuit court's refusal to set aside the void default judgment was error. We reverse the refusal to set aside the default judgment and remand for proceedings consistent with this opinion.

For the foregoing reasons, the decision of the circuit court is

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

HUFF and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Larry Lee, Appellant.

Appeal From Aiken County
James R. Barber, Circuit Court Judge

Opinion No. 3860
Heard May 12, 2004 – Filed August 23, 2004

VACATED

Assistant Appellate Defender Aileen P. Clare, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General David A. Spencer, all of Columbia; and Solicitor Barbara R. Morgan, of Aiken, for Respondent.

CURETON, A.J.: Larry Lee appeals his convictions for four counts of first-degree criminal sexual conduct (CSC) with a minor and one count of lewd act upon a child. Lee asserts the State violated his Fifth Amendment guarantee of due process of law through excessive pre-indictment delay.[1] For the reasons set forth below, we vacate Lee's convictions.

FACTS

Diana Baldwin married Larry Lee on August 29, 1982. After they married, Diana, Lee, Diana's two daughters, who were six and seven years old, and her one-year-old son moved into a home in Aiken. In the latter part of 1988, the Department of Social Services (DSS) began an investigation when Lee's stepdaughters alleged that he had sexually abused them. The allegations of abuse first arose during a juvenile criminal investigation being conducted against the stepdaughters by law enforcement officers. As a result of the investigation, DSS removed the girls from the home on September 15, 1988, and placed them in the custody of their aunt on an emergency basis until a hearing could be held in the family court. Within two to three months, DSS returned the girls to their home. Diana and Lee ultimately divorced in September of 1992.

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[1] Pursuant to Anders v. California, 386 U.S. 738 (1967), and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), Lee's appellate counsel filed a brief along with a petition to be relieved, stating her examination of the record indicated the appeal was without merit. Lee filed a separate pro se response. Following our Anders review, this court ordered the parties to brief the following issue:

> Whether the trial judge erred in declining to dismiss Lee's indictments on the ground Lee's Fifth Amendment due process rights were violated as a result of pre-indictment delay?

This issue is now our sole appellate consideration.

Though the solicitor's office represented the State during all hearings before the family court, the State took no further action on the matter for more than twelve years after the children's return home. On May 14, 2001, an Aiken County grand jury indicted Lee for four counts of first-degree CSC with a minor and one count of lewd act upon a child, all arising from the allegations involving the stepdaughters. Around this same time, Lee was indicted for additional counts of CSC with a minor for incidents that occurred with different victims, including a niece, between 1985 and 1988 and in 1999.[2]

On May 17-21, 2001, Lee was tried only on the indictments involving the stepdaughters. Based on the delay, Lee's counsel requested at the pre-trial hearing that the court dismiss these indictments. During the pre-trial hearing, Lee's counsel informed the judge the State was aware of the charges in 1988 but did not arrest Lee until March 2001 and did not indict him until May 2001. According to Lee's counsel, the DSS worker who was involved in the case wrote a letter on January 6, 1989, stating DSS "believed there was criminal activity" and requested law enforcement make an investigation into the criminal matter. Lee's counsel also stated she was unable to locate records to determine whether this investigation had taken place. Because the State was aware of potential criminal charges against Lee in 1988 and did not bring them until the 1999 charges involving Lee's niece, counsel argued the charges involving the stepdaughters should be dismissed. She contended Lee suffered substantial prejudice as a result of the State's "negligent" delay in bringing the charges. She claimed Lee was prejudiced due to the destruction of crucial records, the absence of witnesses, and the witnesses' inability to recall the alleged incidents in detail.

Specifically, counsel pointed out that the subject matter of the original investigation against the stepdaughters could not be determined given the DSS file had been destroyed and the juvenile officer who originally reported the matter to DSS recalled no details of the investigation. In similar fashion,

[2] Although it is not entirely clear, it appears Lee's former stepdaughters again came forward with their allegations after being informed of the more recent 1999 incidents.

the stepdaughters' school records were no longer available. In addition, the attorney that originally represented Lee before the family court no longer practiced law in South Carolina and could not be located. Based on these hindrances, Lee's counsel moved for the trial judge to dismiss the indictments because the delay in indicting Lee had affected his ability to mount an adequate defense. Though the State offered no explanation for the delay of more than twelve years, it countered that Lee offered no evidence the State intentionally delayed prosecution of the charges.

At the conclusion of the hearing, the judge denied Lee's speedy trial motion, but stated there "may be a 5th Amendment right for pre-indictment or pre-arrest matter, but the law seems to indicate that one, there has to be—show prejudice and two you have to show intention on the part of the government to try and . . . put the individual in a worse position." The judge then denied the motion.

The day of the trial, Lee's counsel renewed her motion. She argued Lee's right to a fair trial had been compromised by the "excessive delay on the part of the State." The judge again denied the motion, stating "the 6th Amendment, the right begins at the time of arrest or indictment and if you're alleging on the 5th Amendment, then you've got to show prejudice . . . and you also got to show there was some intent on the part of the State to put you in a position, a disadvantage." [3]

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[3] Lee's counsel's arguments regarding Lee's right to a speedy trial were intertwined with her motion to dismiss for pre-indictment delay; thus, we briefly address this issue. Here, Lee was arrested in March of 2001 and indicted and tried in May 2001. Because there was not a significant delay between the time Lee was arrested and the time he was tried, there is no merit to his contention that he was denied his right to a speedy trial. Therefore, we concluded during our Anders review that the judge did not err in denying the motion to dismiss on this ground. See State v. Brazell, 325 S.C. 65, 74, 480 S.E.2d 64, 70 (1997) (The Sixth and Fourteenth Amendments to the United States Constitution as well as Article 1, Section 14 of the South Carolina Constitution provide that a criminal defendant is entitled to a speedy trial.); see also United States v. Marion, 404 U.S. 307, 313-15 (1971) (discussing

The jury convicted Lee of four counts of first-degree CSC with a minor and one count of lewd act upon a child. The judge sentenced Lee to an aggregate of forty-five years imprisonment. Lee appeals his convictions and sentences.

DISCUSSION

Lee argues his convictions should be vacated because of the excessive pre-indictment delay. We agree.

"The Due Process Clause plays a limited role in protecting against oppressive pre-indictment delay." State v. Brazell, 325 S.C. 65, 72, 480 S.E.2d 64, 68 (1997); see United States v. Lovasco, 431 U.S. 783, 789-90 (1977) (analyzing Due Process Clause of the Fifth Amendment with respect to pre-indictment delay); United States v. Marion, 404 U.S. 307, 324 (1971) (recognizing Due Process Clause of the Fifth Amendment provides basis for dismissing indictment as a result of pre-indictment delay).

In Brazell, our supreme court considered the issue of pre-indictment delay. In its analysis, the court relied on decisions of the Fourth Circuit Court of Appeals. The court stated:

> The United States Supreme Court has developed a two-prong inquiry when pre-indictment delay is alleged to violate due process. First, the defendant has the burden of proving the pre-indictment delay caused substantial actual prejudice to his right to a fair trial. Second, if the defendant shows actual prejudice, the court must consider the prosecution's reasons for the delay and balance the justification for delay with any prejudice to the defendant. If the court finds the delay was an intentional device to gain a tactical advantage over the accused, the court should

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pre-indictment delay in the context of the Sixth Amendment speedy trial provision; concluding Sixth Amendment speedy trial provision does not provide defendant protection until he or she is indicted).

> dismiss the indictment. Id.; Howell v. Barker, 904 F.2d 889 (4th Cir.), cert. denied, 498 U.S. 1016, 111 S. Ct. 590, 112 L.Ed.2d 595 (1990); United States v. Automated Medical Laboratories, Inc., 770 F.2d 399 (4th Cir. 1985). When balancing the prejudice and the justification, "[t]he basic inquiry then becomes whether the government's action in prosecuting after substantial delay violates 'fundamental conceptions of justice' or 'the community's sense of fair play and decency.'" Howell, 904 F.2d at 895 (quoting United States v. Automated Medical Laboratories, Inc., 770 F.2d 399, 404 (4th Cir.1985)).

Brazell, 325 S.C. at 72-73, 480 S.E.2d at 68-69.

Reliance on the Fourth Circuit's interpretation of the pre-indictment delay test is significant in that it applies a less stringent standard as compared to other federal circuits. See Jones v. Angelone, 94 F.3d 900, 905 (4th Cir. 1996) (recognizing that federal circuits, with the exception of the Fourth Circuit and the Ninth Circuit, have held that "in order to establish that a lengthy pre-indictment delay rises to the level of a due process violation, a defendant must show not only actual substantial prejudice, but also that 'the government intentionally delayed the indictment to gain an unfair tactical advantage for other bad faith motives'" (quoting United States v. Crooks, 766 F.2d 7, 11 (1st Cir.), cert. denied, 474 U.S. 996 (1985))).

Under the Fourth Circuit's standard, a defendant who meets the initial burden of proving substantial actual prejudice does not have to further prove improper prosecutorial motive as the cause for the delay. Howell v. Barker, 904 F.2d 889, 894-95 (4th Cir.), cert. denied, 498 U.S. 1016 (1990). In rejecting the decisions from the majority of the federal circuits, the Fourth Circuit reasoned as follows:

> Taking this position to its logical conclusion would mean that no matter how egregious the prejudice to a defendant, and no matter how long the preindictment delay, if a defendant cannot prove improper prosecutorial motive, then no due process violation has occurred. This conclusion, on its face, would violate

> fundamental conceptions of justice, as well as the community's sense of fair play. Moreover, this conclusion does not contemplate the difficulty defendants either have encountered or will encounter in attempting to prove improper prosecutorial motive.

Howell, 904 F.2d at 895.

Despite the clear reliance on Fourth Circuit precedent in Brazell, the State contends our supreme court did not adopt the more lenient standard for pre-indictment delay. Instead, "the State submits that the burden is on the defendant to show that the delay was intentional and to gain a tactical advantage." We disagree with this contention.

Although a trial court should dismiss an indictment if the defendant shows improper prosecutorial motive for delaying indictment, such a showing is not required for pre-indictment delay to violate due process. Brazell, 325 S.C. at 72, 480 S.E.2d at 69. While a finding of improper prosecutorial motive ends the inquiry, the absence of such a showing does not likewise terminate the analysis. Instead, the proper course is to proceed to the two-prong inquiry applied in the Fourth Circuit in the case of United States v. Automated Medical Laboratories, Inc., 770 F.2d 399, 403-04 (4th Cir. 1985), and adopted by our supreme court in Brazell. Under this test, the defendant first has the burden of proving the pre-indictment delay caused substantial actual prejudice to his right to a fair trial. Id. Second, the court must then consider the State's reason for the delay and balance the justification for delay with any prejudice to the defendant. Id.

Here, the trial court erred as a matter of law in placing the burden on Lee to prove substantial actual prejudice as well as the State's improper motive for the delay. Because the court required Lee to demonstrate intentional delay by the State, the court's decision is controlled by an error of law. United States v. Lynch, No. 94-5350, 1995 WL 325670, at *2 (4th Cir. June 1, 1995) (recognizing district court's decision regarding pre-indictment delay was a mixed question of law and fact and will only be reversed if clearly erroneous) (citing United States v. Beszborn, 21 F.3d 62 (5th Cir.

1994), cert. denied, Westmoreland v. United States, 513 U.S. 934 (1994)). Without this additional burden, we find Lee established that the delay caused substantial actual prejudice.

In applying the first prong, "substantial prejudice" requires a showing that the defendant "'was meaningfully impaired in his ability to defend against the state's charges to such an extent that the disposition of the criminal proceeding was likely effected [sic].'" Brazell, 325 S.C. at 73, 480 S.E.2d at 69 (quoting Jones v. Angelone, 94 F.3d 900, 907 (4th Cir. 1996)). "When the claimed prejudice is the unavailability of a witness, courts require that the defendant identify the witness he would have called; demonstrate, with specificity, the expected content of that witness' testimony; establish that he made serious attempts to locate the witness; and finally, show that the information the witness would have provided was not available from other sources." Brazell, 325 S.C. at 73, 480 S.E.2d at 69.

We note Lee did more than merely rely on the length of the delay to establish substantial actual prejudice. As Lee's counsel pointed out, the delay of twelve years presented a significant obstacle in preparing an adequate defense and receiving a fair trial. All the records from the family court case have been destroyed. No records contemporaneous with the alleged offenses are available, particularly those explaining why the stepdaughters were placed back into Lee's home after being removed. Lee's efforts to acquire the same information from other sources were likewise unavailing. Lee's original attorney could not be located, and the DSS investigator could recall no specifics about the investigation. Without this information, Lee's counsel could not adequately cross-examine the victims and other family members regarding the alleged incidents and the juvenile investigation that prompted DSS to become involved. Moreover, Lee's counsel was also prevented from refuting the delayed disclosure evidence presented by the State through its expert witness.

Because Lee established that he was actually and substantially prejudiced, the inquiry turns to a consideration of the State's reasons for the pre-indictment delay. Under the second prong of the test, the court must balance the State's justification for the delay against the prejudice to the defendant. Brazell, 325 S.C. at 72, 480 S.E.2d at 68-69. In this case, the

State has offered no explanation for the delay in indicting Lee. Given there is no valid justification, we find the State's prosecution of Lee violated "'fundamental conceptions of justice'" and "'the community's sense of fair play and decency.'" Id. at 73, 480 S.E.2d at 69 (quoting Howell v. Barker, 904 F.2d 889, 895 (4th Cir.), cert. denied, 498 U.S. 1016 (1990)); see Howell, 904 F.2d at 895 (affirming district court's finding of unconstitutional pre-indictment delay where actual prejudice was assumed and conceded and the State failed to offer valid justification for the pre-indictment delay that prejudiced defendant). Accordingly, Lee's convictions involving his former stepdaughters are

VACATED.

HEARN, C.J. and STILWELL, J., concur.