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 26, 2008

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 of his/her intent to apply. Correspondence and questions may be directed to the Judicial Merit Selection Commission as follows:

Jane O. Shuler, Chief Counsel
Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6092

The Commission will not accept applications after **12:00 Noon on Friday, September 26, 2008.**

The term of the office currently held by the Honorable Kaye G. Hearn, Chief Judge of the Court of Appeals, Seat 5, will expire on June 30, 2009.

A vacancy will exist in the office currently held by the Honorable James C. Williams, Jr., Judge of the Circuit Court for the First Judicial Circuit, Seat 1, upon Judge William's retirement on or before January 17, 2009. The successor will fill the unexpired term of that office which will expire on June 30, 2010, and the subsequent full term which will expire on June 30, 2016.

The term of the office currently held by the Honorable G. Thomas Cooper, Jr., Judge of the Circuit Court for the Fifth Judicial Circuit, Seat 3, will expire on June 30, 2009.

A vacancy exists in the office formerly held by the late Honorable James W. Johnson, Jr., Judge of the Circuit Court for the Eighth Judicial Circuit, Seat 2. The successor will fill the unexpired term of that office which will expire on June 30, 2012.

The term of the office currently held by the Honorable Roger M. Young, Judge of the Circuit Court for the Ninth Judicial Circuit, Seat 3, will expire on June 30, 2009.

The term of the office currently held by the Honorable Larry R. Patterson, Judge of the Circuit Court for the Thirteenth Judicial Circuit, Seat 3, will expire on June 30, 2009.

The term of the office currently held by the Honorable Carmen Tevis Mullen, Judge of the Circuit Court for the Fourteenth Judicial Circuit, Seat 2, will expire on June 30, 2009.

The term of the office currently held by the Honorable Benjamin H. Culbertson, Judge of the Circuit Court for the Fifteenth Judicial Circuit, Seat 2, will expire on June 30, 2009.

A vacancy will exist in the office currently held by the Honorable John M. Milling, Judge of the Circuit Court, At-Large, Seat 1, upon Judge Milling's retirement on or before April 5, 2009. The successor will fill the unexpired term of that office which will expire on June 30, 2009, and the subsequent full term which will expire on June 30, 2015.

The term of the office currently held by the Honorable R. Markley Dennis, Jr., Judge of the Circuit Court, At-Large, Seat 2, will expire on June 30, 2009.

The term of the office currently held by the Honorable Clifton Newman, Judge of the Circuit Court, At-Large, Seat 3, will expire on June 30, 2009.

The term of the office currently held by the Honorable Edward W. Miller, Judge of the Circuit Court, At-Large, Seat 4, will expire on June 30, 2009.

The term of the office currently held by the Honorable J. Mark Hayes, II, Judge of the Circuit Court, At-Large, Seat 5, will expire on June 30, 2009.

A vacancy will exist in the office currently held by the Honorable James E. Lockemy, Judge of the Circuit Court, At-Large, Seat 6, due to his election to the Court of Appeals, Seat 9 on May 21, 2008. The successor will fill the unexpired term of that office which will expire on June 30, 2009, and the subsequent full term which will expire on June 30, 2015.

The term of the office currently held by the Honorable J. Cordell Maddox, Jr., Judge of the Circuit Court, At-Large, Seat 7, will expire on June 30, 2009.

The term of the office currently held by the Honorable Kenneth G. Goode, Judge of the Circuit Court, At-Large, Seat 8, will expire on June 30, 2009.

The term of the office currently held by the Honorable J. Michelle Childs, Judge of the Circuit Court, At-Large, Seat 9, will expire on June 30, 2009.

The term of the office currently held by the Honorable James R. Barber, III, Judge of the Circuit Court, At-Large, Seat 10, will expire on June 30, 2009.

A vacancy will exist in the office currently held by the Honorable Barry W. Knobel, Judge of the Family Court for the Tenth Judicial Circuit, Seat 1, upon Judge Knobel's retirement on or before January 1, 2009. The successor will fill the unexpired term of that office which will expire on June 30, 2013.

A vacancy will exist in the office currently held by the Honorable Timothy L. Brown, Judge of the Family Court for the Thirteenth Judicial Circuit, Seat 6, upon Judge Brown's retirement on or before November 3, 2008. The successor will fill the unexpired term of that office which will expire on June 30, 2010, and the subsequent full term which will expire on June 30, 2016.

The term of the office currently held by the Honorable Marvin Frank Kittrell, Chief Judge of the Administrative Law Court, Seat 1, will expire on June 30, 2009.

A vacancy exists in the office formerly held by the Honorable John D. Geathers, Judge of the Administrative Law Court, Seat 4. The successor will fill the unexpired term of that office which will expire on June 30, 2010, and the subsequent full term which will expire on June 30, 2015.

The term of the office currently held by the Honorable Marvin H. Dukes, III, Master-in-Equity for the Fourteenth Circuit (Beaufort County), will expire on June 6, 2009.

The term of the office currently held by the Honorable Martin R. Banks, Master-in-Equity for the First Circuit (Calhoun County), will expire on August 14, 2009.

The term of the office currently held by the Honorable Charles B. Simmons, Jr., Master-in-Equity for the Thirteenth Circuit (Greenville County), will expire on December 31, 2009.

A vacancy will exist in the office currently held by the Honorable James Stanton Cross, Jr., Master-in-Equity for the Fifteenth Circuit (Horry County), upon Judge Cross's retirement on or before July 31, 2009. The successor will fill the unexpired term of that office which will expire on July 31, 2009, and the subsequent full term which will expire on July 31, 2015.

The term of the office currently held by the Honorable O. Davie Burgdorf, Master-in-Equity for the First Circuit (Orangeburg County), will expire on August 14, 2009.

The term of the office currently held by the Honorable Joseph M. Strickland, Master-in-Equity for the Fifth Circuit (Richland County), will expire on April 30, 2009.

The term of the office currently held by the Honorable Gordon G. Cooper, Master-in-Equity for the Seventh Circuit (Spartanburg County), will expire on June 30, 2009.

The term of the office currently held by the Honorable S. Jackson Kimball, III, Master-in-Equity for the Sixteenth Circuit (York County), will expire on June 30, 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.

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OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 34
September 2, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Colleton Preparatory Academy, Inc., Plaintiff,

v.

Hoover Universal, Inc., Defendant.

CERTIFIED QUESTIONS

ON CERTIFICATION FROM
U.S. District Judge David C. Norton
District of South Carolina

Opinion No. 26535
Heard September 19, 2007 – Filed August 25, 2008

QUESTIONS ANSWERED

Charles Hiram Williams, II, of Williams & Williams, of Orangeburg, for Plaintiff.

Charles J. Baker, III, of Buist, Moore, Smythe & McGee, of Charleston; and Richard Kenneth Wray and Casey L. Westover, both of Reed Smith, of Chicago, IL, for Defendant.

C. Mitchell Brown and William C. Wood, Jr., of Nelson Mullins Riley & Scarborough, of Columbia, for Amicus Curiae Product Liability Advisory Council, Inc.

Saunders M. Bridges, Jr., of Aiken, Bridges, Nunn, Elliott & Tyler, of Florence, for Amicus Curiae Beazer Fast Food, Inc. and Osmose, Inc.

JUSTICE BEATTY: We accepted two questions certified by the United States District Court for South Carolina pursuant to Rule 228, SCACR. The questions involve recovery in tort in light of the economic loss doctrine and recovery under the South Carolina Unfair Trade Practices Act (UTPA) for a remote user. After careful consideration, we answer the first question "no," and "yes." We answer the second question, "yes."

FACTS

Plaintiff Colleton Preparatory Academy is a private school in Walterboro, South Carolina.[1] The roof of Plaintiff's administration building was constructed in 1972, and the building's roof truss system contained wood treated with "Fire-X," a fire retardant manufactured by Defendant Hoover's predecessor. In 2002, Plaintiff discovered the fire retardant treated (FRT) wood was deteriorating, causing failure of numerous chord and web members, corrosion to the metal truss connection plates, deterioration of the roof sheathing, and loss of strength of structural wood members. The deterioration of the FRT wood caused structural problems which would eventually lead to truss failure and partial or full roof collapse. The majority of the roof trusses and sheathing had failed or were about to fail, the roof

[1] The facts are substantially taken from the district court's February 27, 2007 order certifying the two questions to this Court.

framing and sheathing were substantially impaired, and the truss system had to be replaced for safety reasons.

Plaintiff filed an action in the United States District Court for the District of South Carolina against Defendant seeking damages caused by the deterioration of the wood under theories of negligence, reckless/gross negligence, and violation of the UTPA. Defendant failed to answer and was held in default. The district court denied the motion to set aside the default and made the following findings: (1) Defendant's product was defective and unreasonably dangerous for its foreseeable use because of the structural lumber's propensity to lose strength; (2) Defendant was negligent or reckless in advertising and marketing the FRT lumber to building code officials, architects, truss manufacturers, and end users when it knew or should have known the product was defective or unsuitable for use under foreseeable conditions; (3) Defendant failed to provide adequate updates and warnings; (4) Defendant admitted by its default and evidence introduced at the damages hearing supported a conclusion that the FRT lumber posed a serious risk of bodily harm; (5) Defendant admitted by its default, and evidence introduced at the damages hearing supported a conclusion, that it had a duty to insure the product met or exceeded industry standards and it violated that duty by manufacturing and selling a product that was unreasonably dangerous; (6) for purposes of the UTPA, Defendant's actions were unfair, capable of repetition, and injurious to the public, and Defendant knew the FRT lumber was unsuitable for its advertised use and it resulted in damages to Plaintiff; and (7) although there is no evidence that Plaintiff dealt directly with Defendant, Defendant admitted by its default that it marketed the product to end users when it knew or should have known it was defective and unsuitable for use under foreseeable conditions in roofing systems.

After a bench trial, the district court awarded Plaintiff $871,619.15 in damages under the UTPA claim to cover the cost of repairs to the roof trusses and temporary classroom expenses.[2] The district court held that the

[2] If the repairs to the roof could be completed during the summer, the order held the damages award would be reduced to $690,158.62 because the temporary expenses could be avoided.

economic loss rule barred Plaintiff from recovering under a negligence theory because the FRT wood was causing damage only to itself and not to persons or property. After both parties filed for reconsideration, the district court filed an order on January 31, 2006, requesting certification of questions regarding exceptions to the economic loss doctrine and the necessity of privity in a UTPA claim. After considering the motions for reconsideration and Plaintiff's motion to amend the order of certification, the district court issued an order on February 27, 2007, modifying the January 31, 2006 order to include the current version of the two certified questions. This Court accepted the certified questions.

STANDARD OF REVIEW

In answering a certified question raising a novel question of law, the Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of the state as well as the Court's sense of law, justice, and right. McCullough v. Goodrich & Pennington Mortgage Fund, Inc., 373 S.C. 43, 47, 644 S.E.2d 43, 46 (2007); Howell v. United States Fid. & Guar. Ins. Co., 370 S.C. 505, 508, 636 S.E.2d 626, 627 (2006); Peagler v. USAA Ins. Co., 368 S.C. 153, 157, 628 S.E.2d 475, 477 (2006).

CERTIFIED QUESTIONS

(1) Can the user of a defective product recover in tort when only the product itself has been injured and when the product either violated generally accepted industry standards or posed a serious risk of bodily harm?

(2) Can a plaintiff who used but did not purchase a product directly from the defendant and nonetheless suffered a loss as a result of the defendant's unfair or deceptive acts obtain relief under the South Carolina Unfair Trade Practices Act?

DISCUSSION

I. Economic Loss Doctrine

The first certified question does not specifically mention the economic loss doctrine. However, it is clear from the district court's order and language used in the question that the district court seeks clarification regarding whether the legal duties[3] to conform to industry standards and to avoid creating a serious risk of bodily harm found in Kennedy v. Columbia Lumber & Manufacturing Company, 299 S.C. 335, 384 S.E.2d 730 (1989), are limited to the residential housing arena or whether they have wider application.

Initially, we note that in Kennedy, this Court held "a cause of action in negligence will be available where a builder has violated a legal duty, no matter the type of resulting damage. The 'economic loss' rule will still apply where duties are created *solely* by contract. In that situation, no cause of action in negligence will lie." Kennedy, 299 S.C. at 347, 384 S.E.2d at 737; see Dorrell v. South Carolina Dep't of Transp., 361 S.C. 312, 318, 605 S.E.2d 12, 15 (2004) (noting paving company's contract with the State did not limit its liability in negligence to third parties because the common law duty of due care existed outside of the contract).

The purpose of the economic loss rule is to define the line between tort and contract recovery. Kennedy, 299 S.C. at 345, 384 S.E.2d at 736 ("This rule exists to assist in determining whether contract or tort theories are applicable to a given case."). The economic loss rule generally provides there is no tort liability for a defective product if the product damages only itself. Id. at 341, 384 S.E.2d at 734. "Where a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only 'economic' losses." Id. at 345, 384 S.E.2d at 736. However, where a defective product

[3] These legal duties have also been referred to as "exceptions" to the economic loss doctrine.

harms other property or causes physical injury, the losses are more than merely economic, the economic loss rule is inapplicable, and a remedy lies in either tort or contract. Id.; Kershaw County Bd. of Educ. v. United States Gypsum Co., 302 S.C. 390, 393, 396 S.E.2d 369, 371 (1990) (finding the economic loss doctrine did not bar recovery in an asbestos case because the defective product caused harm to "other property," including the rest of the building).[4]

This Court has continually expressed uneasiness with the economic loss doctrine. The majority view of the doctrine employs a legal framework that focuses on consequence, not action.[5] We have said that this framework generates difficulties. As a result, we partially rejected the rule in the residential home building context, leaving it viable in situations where a builder violates only a contractual duty. Kennedy, 299 S.C. at 344, 384 S.E.2d at 736; Kershaw, 302 S.C. at 393, 396 S.E.2d at 371. Although the economic loss rule bars tort recovery where duties are created solely by contract, we have long recognized tort actions for purely economic losses as a

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[4] The question as posited by the district court is interesting in that the record reflects that the FRT wood damaged more than itself. It appears to have actually damaged metal truss connection plates and the roof sheathing. That being the case, the economic loss rule would be inapplicable. Kershaw, 302 S.C. at 393, 396 S.E.2d at 371.

[5] The majority rule provides it is the consequence, i.e., the nature of the actual loss, that is important in determining whether relief lies in tort. See East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 869-72 (1986) (rejecting minority economic loss view that manufacturers have a duty to make non-defective products and are liable in tort, whether or not the defect created an unreasonable risk of harm; rejecting the intermediate approach that tort recovery turns on the risk of harm by a defective product; and adopting the majority rule that "a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself" in an admiralty case); Restatement (Third) of Torts § 21 cmt. d (1998) (noting that a strong majority of courts follow the East River interpretation of the economic loss rule).

result of a breach of a special legal duty outside the contract. See Tommy L. Griffin Plumbing & Heating v. Jordan, Jones & Goulding, Inc., 320 S.C. 49, 55, 463 S.E.2d 85, 88-89 (1995) (finding design professionals, including engineers, may have a duty separate and distinct from contractual duties such that the economic loss doctrine would not prohibit a tort action); Beachwalk Villas Condo. Ass'n v. Martin, 305 S.C. 144, 146-47, 406 S.E.2d 372, 374 (1991) (finding a special duty for architects); Kennedy, 299 S.C. at 347, 384 S.E.2d at 738 (finding builders owe three legal duties to home buyers beyond the contract); Lloyd v. Walters, 276 S.C. 223, 226, 277 S.E.2d 888, 889 (1981) (finding an attorney liable for economic loss to a corporate shareholder when attorney breached a duty to the corporation); Georganne Apparel v. Todd, 303 S.C. 87, 92, 399 S.E.2d 16, 18-19 (Ct. App. 1990) (dismissing an accountant malpractice case for failure to prosecute); but see McCullough v. Goodrich & Pennington Mortgage Fund, Inc., 373 S.C. 43, 53, 644 S.E.2d 43, 49 (2007) (rejecting the notion of a special duty in the secured transactions arena).

In Kennedy, we adopted a framework that changed the focus of the inquiry from the consequences of the alleged tortfeasor's actions to whether or not the alleged tortfeasor acted in a way that violated a legal duty aside from his contractual duties. If the act violates a contractual duty only, then the liability is in contract; however, if the act violates a non-contractual legal duty, then the liability is both in contract and tort. Kennedy, 299 S.C. at 345-46, 384 S.E.2d at 737. This change in analytical focus did not totally eviscerate the economic loss rule; however, the rule is now less restrictive.

We turn now to whether the legal duties found in Kennedy are applicable outside of the residential home building area generally.

Violation of Industry Standards[6]

Evidence of industry standards has been recognized by this Court as highly probative on the issue of defining the duty of care. Elledge v. Richland/Lexington Sch. Dist. Five, 352 S.C. 179, 189, 573 S.E. 2d 789, 795 (2002).

In Kennedy, we considered the public policy of protecting new home buyers from builders who "place defective and inferior construction into the stream of commerce." Kennedy, 299 S.C. at 344, 384 S.E.2d at 736. We found a builder owes legal duties to a home buyer beyond the contract, and thus, a builder could be liable in tort for purely economic losses, where: "(1) the builder has violated an applicable building code; (2) the builder has deviated from industry standards; or (3) the builder has constructed housing he knows or should know will pose a serious risk of physical harm." Id. at 347, 384 S.E.2d at 738.

The Kennedy court concluded that an expansion in traditional concepts of tort duty was needed in order to provide the innocent home buyer with protection. Kennedy, 299 S.C. at 334, 384 S.E. 2d at 735. The court noted the inherent unequal bargaining positions, the fact that buyers no longer supervised construction of their homes, and South Carolina's acceptance of the legal maxim *caveat venditor*. Id. at 343, 384 S.E.2d at 735.

The same policy considerations noted in Kennedy are arguably not present in the commercial construction arena. However, in Kennedy we expressed our approval of the legal maxim *caveat venditor* and recognized a new framework for analysis that focused on the actor's actions, not consequences. In our view this analytical framework is universal. Again, focusing on whether or not the actor violated a non-contractual duty does not

[6] A "standard" is a "model accepted as correct by custom, consent, or authority . . . a criterion for measuring acceptability, quality, or accuracy." Blacks Law Dictionary 1412-13 (7th ed. 1999).

eviscerate the economic loss doctrine; it only determines its applicability to the case presented.

By focusing on the actor's actions in Kennedy, we concluded that builders have a legal duty outside of the contract to make products that meet industry standards. Kennedy, 299 S.C. at 347, 384 S.E.2d at 738. This Court has also stated that if a user of a product is a member of the class for which the product was manufactured, the user is entitled to a duty of care in manufacturing commensurate with industry standards. Terlinde v. Neely, 275 S.C. 395, 399, 271 S.E. 2d 768, 769 (1980) ("The plaintiffs, being a member of the class for which the home was constructed, are entitled to a duty of care in construction commensurate with industry standards."). However, this Court will not extend the concept of a legal duty of care in tort liability beyond reasonable limits. See McCollough, 373 S.C. at 53, 644 S.E.2d at 49 (rejecting the notion of a special duty in the secured transactions arena). Industry standards are probative in *defining* the standard or duty of care; however, industry standards do not *determine* if the prerequisite duty of care is *owed*. In other words, a violation of industry standards is only helpful in determining that a duty owed has been breached.

In the instant case, assuming that a duty of care is owed to Colleton, a breach of industry standards would serve as evidence of Hoover's breach of that duty of care. Being that the duty of care does not arise out of a contract, the fact that only the product itself is injured is irrelevant. Kennedy dictates that the focus of the inquiry is on Hoover's action, not the consequence of the action. Thus, the economic loss rule is not applicable and would not bar recovery in tort.

Risk of Serious Bodily Harm

In light of our framework of focusing on activity, not just consequences, it is our view that parties should not have to wait until a dangerous and defective product causes serious bodily injury before seeking a tort action. In this regard, we see no reason to treat commercial parties differently from home buyers or other consumers. See JKT Co. v. Hardwick, 274 S.C. 413, 418, 265 S.E.2d 510, 512 (1980) (noting that there is "no

justifiable reason why an innocent corporate consumer should be denied recovery [for lack of privity in an implied warranty action] when a manufacturer places a defective article into commerce"). Extending the legal duty to manufacture products that do not pose a "serious threat of physical harm" to the commercial context would protect commercial plaintiffs in the same way we sought to protect home buyers: a manufacturer placing a dangerous, defective product into the stream of commerce would not unfairly escape liability because only the defective product was injured and no one was seriously hurt. Further, the traditional lines between tort and contract are not blurred by our decision because tort liability for purely economic losses only attaches where there is a breach of these legal duties beyond the contractual duties. Kennedy, 299 S.C. at 345-46, 384 S.E.2d at 737.

Extending the serious threat of physical (bodily) harm exception generally is consistent with our policy of providing a remedy where a duty outside the contract is breached. Manufacturers have a duty, separate and apart from contractual duties, to create safe products, and they are liable for poorly made products used in a foreseeable manner. See Salladin v. Tellis, 247 S.C. 267, 269-71, 146 S.E.2d 875, 876-77 (1966) (noting a manufacturer of an imminently dangerous product is liable in tort for physical harm caused, regardless of whether the injured party is in privity of contract, when put to its intended use). Other jurisdictions providing an exception where a defective product poses a serious threat of physical harm have expressed the same concerns regarding protecting an injured party in a general commercial context from a fortuitous tortfeasor that we expressed in Kennedy. See Morris v. Osmose Wood Pres., 667 A.2d 624, 631-32 (Md. 1994) (noting that, while not proven by the parties, Maryland nevertheless allows recovery for purely economic losses where it is shown that there is a clear danger of death or serious injury); Council of Co-Owners v. Whiting-Turner, 517 A.2d 336, 345 (1986) (focusing on the duty owed in an economic loss case, rather than on the "fortuitous circumstance of the nature of the resultant damage," and finding that one could recover in tort for purely economic losses "where the risk is of death or personal injury");[7] see also Philadelphia Nat'l Bank v.

[7] The South Carolina Court of Appeals originally rejected the Maryland court's analysis in Whiting-Turner in its decision in Carolina Winds Owners'

Dow Chem. Co., 605 F.Supp. 60, 64 (E.D.Pa. 1985) ("PNB") (noting that while the court was reluctant to rely solely on evidence of damage to other property, the court found Pennsylvania would allow recovery in strict liability because there was also evidence that the defective product posed a serious risk to passers-by); Trustees of Columbia Univ. v. Mitchell/Giurgola Assocs., 492 N.Y.S.2d 371, 376 (N.Y. App. Div. 1985) ("Columbia") (finding that the economic loss rule did not bar recovery, and the codefendants were entitled to contribution from supplier, because a "wall rendered defective and in imminent danger of collapse by improperly fabricated materials constitutes the type of dangerous product for which the manufacturer owes a duty to the ultimate user under the doctrine of strict liability bespeaks itself").[8]

Ass'n v. Joe Harden Builder, Inc., 297 S.C. 74, 85-88, 374 S.E.2d 897, 905-06 (Ct. App. 1988). However, since this Court's overruling of Carolina Winds by our decision in Kennedy, 299 S.C. 335, 384 S.E.2d 730, our focus has been on the legal duties owed and our concern with the difficulties posed by the economic loss doctrine.

[8] We respectfully disagree with the dissent's reading of PNB and Columbia. The risk of physical injury played a role in finding strict liability in both cases. While the parties in PNB acknowledged the general rule that negligence and strict liability could not be imposed for mere economic losses, the court went on to find strict liability where there was some evidence of damage to components and the defective construction caused a "real, unspeculated risk of harm to passers-by on the street below." PNB, 605 F.Supp. at 64. In Columbia, the installers of a wall that was in danger of crumbling on a busy university campus appealed the lower court's rulings that the supplier could not be held accountable under the doctrines of indemnity and contribution. The plaintiff in the case did not appeal a prior court's ruling that the economic loss doctrine barred its action against supplier. The Columbia court found that it was not bound by the law of the case in that particular procedural posture, and found that the economic loss doctrine would, in fact, not bar recovery because the supplier owed a duty to supply safe products. While the court found the supplier was not liable for indemnity, it held that supplier was liable for contribution because the defective materials supplied by supplier damaged the wall and posed an

We are mindful that extending the serious threat of harm exception may raise concerns that manufacturers would essentially become insurers against every remote threat of harm. This is not our intent, and we emphasize that the exception applies to serious threats with recovery calculated as the costs to repair or remove the dangerous product.[9] In order to limit situations where the exception applies, we adopt Maryland's balancing test: the nature of the damage threatened and the probability that the damage would occur should be examined to determine whether there is a "clear, serious, and unreasonable risk of death or personal injury." Morris, 667 A.2d at 631-32 ("We examine both the nature of the damage threatened and the probability of damage occurring to determine whether the two, viewed together, exhibit a clear, serious, and unreasonable risk of death or personal injury. Thus, if the

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unduly dangerous condition for which damages under strict liability may be maintained. Columbia, 492 N.Y.S.2d at 376. Thus, the court noted that while the plaintiff was unable to recover directly against the supplier because it did not appeal the prior court's findings that supplier had no duties under strict liability, the supplier was still liable for contribution because there was actually a duty owed. Id. at 377.

In the instant case, the dissent's reasoning would require that Colleton refrain from taking any remedial action and allow the roof to collapse, potentially causing death and serious bodily injury. This would be an unnecessary and unacceptable price to pay for the protection of the economic loss rule; a rule that is falling out of judicial favor in this state and other jurisdictions. As for the dissent's concern for the use of " foreign cases" in our analysis, we are reminded that this is a case of first impression in this state. We also note the dissent's use of cases from California and the 6th Circuit in its analysis.

[9] See Matthew W. Gissendanner, Tort Recovery for Defective Products Posing a Threat of Bodily Harm: An Exception to the Economic Loss Rule?, 57 S.C.L.Rev. 619, 621-23 (2006) (predicting whether this Court will extend exceptions to the economic loss rule and proposing the damages could be calculated as the costs associated with replacing the defective product).

possible injury is extraordinarily severe, i.e., multiple deaths, we do not require the probability of the injury occurring to be as high as we would require if the injury threatened were less severe, i.e., a broken leg or damage to property."). For the foregoing reasons, we conclude the legal duties to avoid making products which pose a serious risk of physical injury as found in Kennedy, extend to manufacturers.

Accordingly, we answer the first certified question, "no," if there is merely a breach of industry standards without an accompanying breach of a legal duty owed, and "yes," if there is a breach of duty accompanied by a clear, serious and unreasonable risk of bodily injury or death.

II. UTPA

In the order requesting certification, the district court asked for clarification regarding whether a remote purchaser may maintain a UTPA suit. Based on the way this question is posed, we answer, "yes."

Under the UTPA, "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" are unlawful. S.C. Code Ann. § 39-5-20(a) (1985). Persons or any legal entity suffering an ascertainable loss of money or real or personal property "*as a result of* the use or employment by another person of an unfair or deceptive method, act or practice" may bring an action to recover actual damages. S.C. Code Ann. § 39-5-140(a) (1985) (emphasis added). To recover under the Act, a plaintiff must prove a violation of the Act, proximate cause, and damages. Charleston Lumber Co. v. Miller Housing Corp., 318 S.C. 471, 482, 458 S.E.2d 431, 438 (Ct. App. 1995).

In their UTPA discussions, the district court and the parties to this action focus primarily on Reynolds v. Ryland Group, Incorporated, 340 S.C. 331, 531 S.E.2d 917 (2000), and request clarification of whether this case holds a general privity requirement for UTPA claims. In Reynolds, this Court answered the following certified question from the district court: "Under South Carolina law, can Plaintiffs in a residential construction defects

case sue Defendant builder, seller and developer under the South Carolina Unfair Trade Practices Act if Plaintiffs did not purchase their residences from Defendant but from the original homeowner more than three years after the original sale?" Reynolds, 340 S.C. at 333, 531 S.E.2d at 918. The Reynolds court discussed a Texas causation case and acknowledged there was no specific provision in UTPA limiting a cause of action to an immediate purchaser. In discussing the plaintiff's request that the Court find privity of contract was not required in a UTPA claim by a subsequent purchaser, the Reynold's court noted that it "has taken a very active role in the construction area to protect innocent purchasers" including "the elimination of privity to protect an innocent purchaser who has invested his life savings from latent defects in a mobile society where it is foreseeable that more than the original owner will enjoy a home from a builder." Reynolds, 340 S.C. at 334, 531 S.E.2d at 919. However, the Court answered the certified question in the negative, noting that subsequent purchasers had other remedies against the builder in tort, negligence, and implied warranties. Reynolds, 340 S.C. at 335, 531 S.E.2d at 919-20. The dissent in Reynolds pointed out that: the plain meaning of the UTPA statute did not limit remedies to the initial purchaser; requiring privity would contravene South Carolina's long policy of protecting home owners and prior precedent stating the privity requirement was abolished;[10] imposing a privity requirement would bar UTPA suits by competitors; and the lack of a privity requirement would not lessen a plaintiff's need to prove a causal connection between the deceptive practices and their injury. Reynolds, 340 S.C. at 336-39, 531 S.E.2d at 920-22 (Burnett, J., dissenting).

In answering the certified question, the Reynolds Court did not: impart any particular legal theory to deny UTPA actions to subsequent home buyers; use the word "privity" in its ruling or pronounce that all UTPA actions required privity; or offer guidance as to UTPA claims by remote purchasers or competing entities generally. Id. Reynolds focused on a subsequent

[10] JKT Co., 274 S.C. at 417, 265 S.E.2d at 512 (stating "[w]e do not believe the doctrine of privity in South Carolina has sufficient vitality to permit its resuscitation by Celotex as a bar to JKT's recovery").

purchaser's ability or options to prove his losses were the result of the original builder's deceptive trade practice. As the dissent in Reynolds pointed out, to hold privity is required before a party may maintain a UTPA action would lead to an absurd result. Such a finding would prohibit UTPA actions by all remote buyers and competitors, who have traditionally been allowed to proceed under the Act, because there could be no privity. See Global Prot. Corp. v. Halbersberg, 332 S.C. 149, 156-57, 503 S.E.2d 483, 487 (Ct. App. 1998) (allowing recovery in a UTPA claim between competitors for trademark infringement).

Accordingly, we answer the second certified question, "yes."

CERTIFIED QUESTIONS ANSWERED.

MOORE, ACTING CHIEF JUSTICE and WALLER, J., concur. PLEICONES, J. concurring in part and dissenting in part in a separate opinion in which Acting Justice E. C. Burnett, III, concurs.

JUSTICE PLEICONES: I respectfully concur in part and dissent in part. I agree with the majority that a mere breach of industry standards does not give rise to a tort action, and, further, that the second certified question should be answered "yes." As explained below, I do not join the majority's ruling which would extend the narrow exception to the economic loss rule created in Kennedy v. Columbia Lumber and Mfg. Co., Inc., 299 S.C. 335, 384 S.E.2d 730 (1989) to all tort-based products liability suits where the plaintiff alleges "only the product itself has been injured and [that the] product…posed a serious risk of bodily harm."

Three theories of liability are available to an individual in South Carolina who has suffered a loss as the result of a defective product: breach of warranty, which sounds in contract, and strict liability and negligence, both of which sound in tort. Only warranty and negligence are discussed here.

A negligence products liability claim is premised on a breach of a duty of care resulting in damage to person or property, giving rise to a claim for restorative money damages. While the law of contracts protects a party's expectation that a promise will be fulfilled, negligence awards money damages to restore a person who has suffered a loss.

The economic loss rule emerged from modern products liability law and serves to delineate tort and contract law. See Seely v. White Motor Co., 63 Cal.2d 9, 403 P.2d 145 (1965). The rule states that a tort action for a defective product does not lie unless there is a claim of personal injury or injury to other property of the plaintiff. Where the damage is merely diminution in the product's value, the remedy is in contract for breach of warranty, whether the diminished value is the result of inferior quality, unfitness for intended use, deterioration or destruction by reason of the defect. As Chief Justice Traynor explained in Seely:

> The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the 'luck' of one plaintiff in having an accident causing

> physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone.
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> 63 Cal.2d at 18, 403 P.2d at 151.

In Kennedy v. Columbia Lumber and Mfg. Co. Inc., (Kennedy), *supra*, this Court overruled a decision by the Court of Appeals, Carolina Winds Owners' Ass'n v. Joe Harden Bldrs., 297 S.C. 74, 374 S.E.2d 897 (Ct. App. 1988). In Kennedy, the Court held a cause of action in negligence is available to a new home buyer who has suffered only economic loss to the home itself where the builder has (1) violated an applicable building code; (2) violated industry standards; or (3) constructed housing that he knows or should know will pose serious risks of physical harm. The Court characterized its decision as creating a different approach to the economic loss rule, holding that a builder should be liable in negligence for diminution in value even if only the product is harmed. To date, the Court has not

expanded this approach to the economic loss rule beyond the residential purchaser/builder context.[11]

The present case asks whether the Court will extend the Kennedy exception beyond the home buyer/builder sphere. **On its facts**,[12] this case asks whether the owner (not buyer) of a new commercial (not residential) building may sue a material suppler (not builder or seller) in negligence where only the material has been injured.[13]

I begin by noting that in the residential home cases, the Court has considered the "product" to be the new home: heretofore, there has been no suggestion that we would entertain a products liability suit by the user against the manufacturer of the product components (i.e. the lumber) rather than against the manufacturer of the product (i.e. the builder). See Mt. Lebanon Personal Care Home, Inc. v. Hoover Universal, Inc., 276 F.3d 845 (6th Cir. 2002) (applying Kentucky law and finding that the wood and fire retardant chemicals applied to it would not be a product severable from the building as a whole).

Second, the plaintiff here is not a new home buyer or even a new commercial buyer but rather a commercial entity which commissioned a new building. None of the special policy concerns which underlie the Court's jurisprudence extending warranties and negligence remedies to new home buyers exist here. Cf. Smith v. Breedlove, 377 S.C. 415, 661 S.E.2d 67(2008) (declining to extend warranties implied in home sale where

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[11] Both Beachwalk Villas Condo Ass'n Inc. v. Martin, 305 S.C. 144, 406 S.E.2d 372 (1991) and Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 320 S.C. 49, 463 S.E.2d 85 (1995) are in the nature of design professional 'malpractice' cases. See Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885 (1951).

[12] As explained *infra*, the actual question posed, by its express terms, applies to all defective product cases.

[13] While the facts suggest that more than the FRT has been damaged, the certified question is premised on damage only to that product.

seller/builder was not a professional but had acted as his own general contractor in constructing family home).

Aside from the novel policy questions posed by the facts of this case, the actual question posed by the district court is much broader:

> Can the user of a defective product recover in tort when only the product itself has been injured and when the product either violated generally acceptable industry standards or posed a serious risk of bodily injury?

To answer this question even partly in the affirmative works a wholesale revision of the law of products liability, and erases important distinctions between contract (warranty) and negligence (tort).

I am not persuaded by the majority's reasoning that we should effect such a major change in the law of products liability. The majority opinion first focuses on what it perceives as the similarities between commercial construction and residential construction, and next cites three foreign cases to support the extension of the Kennedy exception to the economic loss rule to commercial builders. As explained below, none of the three cases actually support this extension.

Two of the cases cited by the majority for the proposition that the commercial plaintiffs were able to recover economic losses in a construction setting are Philadelphia Nat'l Bank v. Dow Chem. Co., 605 F.Supp. 60 (E.D.PA. 1985) and Trustees of Columbia Univ. v. Mitchell/Giurgola Assocs., 492 N.Y.S.2d 371 (N.Y. App. Div. 1985). The federal decision in Philadelphia Nat'l Bank, applying Pennsylvania law, contains this concession:

> The parties agree that under Pennsylvania law no negligence or strict liability may be imposed for mere economic loss.

In the other case, Trustees of Columbia University, the holding was that while the manufacturer breached its duty to the user under the doctrine of strict liability, the user's recovery for its losses was barred by the economic loss rule. Id. at 376-377. Both cases in fact apply the economic loss rule to bar a tort recovery in a commercial construction setting.

The third case is from Maryland. Maryland, like South Carolina in Kennedy, recognizes an exception to the economic loss rule in a residential construction case. That jurisdiction held that where the builder's negligent conduct created a clear risk of death or personal injury, an action will lie in negligence for recovery of the reasonable cost of correcting the dangerous condition. Council of Co-Owners Atlantis Condo., Inc. v. Whiting-Turner Contracting, 308 Md. 18, 517 A.2d 336 (1986). In the later Maryland case cited by the majority, the Maryland court did indicate a willingness to extend the economic loss exception and recognize a duty where a defective **component** in a **residential** building created a risk of death or personal injury. Morris v. Osmose Wood Preserving, 340 Md. 519, 667 A.2d 624 (1995). The Morris court clarified the threshold for the application of such an exception:

> We examine both the nature of the damage threatened and the probability of damage occurring to determine whether the two, viewed together, exhibit a clear, serious, and unreasonable risk of death or personal injury. Thus, if the possible injury is extraordinarily severe, i.e., multiple deaths, we do not require the probability of the injury occurring to be as high as we would require if the injury threatened were less severe, i.e. a broken leg or damage to property. Likewise, if the probability of the injury occurring is extraordinarily high we do not require the injury to be as severe as we would if the probability of injury were lower.[14]
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> Id. at 533, 667 A.2d at 631-632.

[14] This balancing test would be used under the majority opinion.

The Morris court found, however, that the allegations in that case did not pose a serious risk of death and personal injury, and affirmed the dismissal of the plaintiffs' claims. As in the present case, the Morris suit sought to recover "the cost of replacing roofs that contained allegedly defective fire retardant treated plywood," and the complaint asserted that the roofs had undergone a chemical reaction, "significantly weakening the roof and resulting in substantial impairment of the strength and structural integrity of the roofs…." The Morris court upheld the dismissal of the complaint, finding that the roof work did not meet the threshold requirement of alleging "the existence of a clear danger of death or serious personal injury." Id. As I read these three cases, none support the extension of Kennedy's exception to the economic loss rule to commercial construction.

After relying upon the perceived similarities between residential and commercial construction, three foreign decisions, and adopting the Maryland court's balancing test, the majority holds not simply that the Kennedy exception will be expanded to include commercial construction, but rather that "a user of a defective product can recover in tort [even] if only the product has been injured if that product poses a serious risk of bodily harm." I respectfully submit there is simply no analysis to support this unprecedented decision, which would rewrite the law of products liability.

In my opinion, the extension of the Kennedy exception to the economic loss rule to commercial builders, much less to all manufacturers, is unprecedented, unwarranted, and unwise. I am much persuaded by the reasoning of the late Justice-elect Bell who cautioned against permitting negligence actions where there is neither personal nor property injury because:

(1) it is not a tort to create risk, only to cause damage;

(2) the quantum of damage is unknowable until injury occurs; to allow repair damages in negligence may not represent the true loss if injury were to occur, and is manifestly speculative;

(3) to impose liability without damages makes the manufacturer of the product an insurer against all possible risk of harm; and

(4) there is no principled way to categorize types or degrees of risk for the purpose of establishing liability. To adopt an *ad hoc* approach is "to abandon the attempt at rule governed decision making… [t]he calculation of risk is a complex, fact intensive, infinitely varied, and inevitably imprecise process. It is far beyond the competence of judges and juries. Even if all risks could be foreseen and precisely calculated, there would still be no certain, predictable standard for identifying which risks should be actionable. And there is no guarantee that tort rules of liability, if they could be fashioned, would redistribute these risks in the most rational, economic way."

Carolina Winds at 87-88, 374 S.E.2d at 905-906.

For the reasons given above, I concur in the decision which answers question one in the negative, and which answers the second question in the affirmative. I dissent from that part of the opinion which answers question one "yes."

Acting Justice E. C. Burnett, III, concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Dale R. Samuels, Respondent.

Opinion No. 26536
Submitted July 14, 2008 - Filed August 25, 2008

PUBLIC REPRIMAND

Lesley M Coggiola, Disciplinary Counsel, and Senior Assistant Attorney General James G. Bogle, Jr., both of Columbia, for Office of Disciplinary Counsel.

Dale R. Samuels, of Cumming, Georgia, Pro Se.

PER CURIAM: Respondent and Disciplinary Counsel have entered into an agreement pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to accept an admonition up to a public reprimand. Respondent understands it is within our discretion to require him to pay the complainant $1,100. We accept the agreement and issue a public reprimand. Respondent is further required to make a payment of $1,100, plus interest from June 15, 2004, to the complainant. The facts, as set forth in the agreement, are as follows.

Facts

In 2003, respondent and his family resided in Florence County, South Carolina. Respondent planned to take employment in Georgia, and in preparation for selling their house in Florence, respondent and his wife,

Jennifer Samuels, had a two-ton central air-conditioning system installed by Jerry's Heating, Air & Refrigeration, Inc. ("Jerry's") on June 24, 2003, for a price of $2,600.00. Respondent claimed that after the installation, Mrs. Samuels attempted to pay the technician immediately, but was told the company would send an invoice. Respondent further stated an invoice was subsequently sent, and Mrs. Samuels mailed the payment to Jerry's.

In the fall of 2003, there was a service problem with the air conditioner, and the technician who responded from Jerry's noticed there was no record of Jerry's receiving payment. Jerry's claimed it did not receive payment and sent Mrs. Samuels a series of letters seeking payment, all addressed to her at the residence in Florence. Respondent has not admitted to receiving these inquiries. Jerry's filed suit in the Florence Summary Court seeking payment, and the Summons and Complaint were personally served upon Mrs. Samuels on or about June 15, 2004, at the residence in Florence.

Respondent filed an Answer and Counterclaim, dated July 12, 2004. Although respondent was aware at the time the lawsuit was commenced that the check mailed to Jerry's for $2,600 never cleared the bank, respondent never tried to stop payment on the first check, issue a second check to Jerry's, or take other remedial action. In the Answer and Counterclaim, respondent asserted lack of personal jurisdiction on the basis Mrs. Samuels was a citizen and resident of Georgia. Respondent has acknowledged that while he believed at the time the technical jurisdiction claim was valid, he later knew the claim was not supported by the facts since at the time the transaction at issue took place, both respondent and Mrs. Samuels were living in Florence.

Respondent set forth the sequence of events regarding payment as described above in the Answer and Counterclaim, but did not disclose that his wife's check had never cleared the bank. Furthermore, respondent asserted Jerry's had recklessly inflicted severe emotional distress upon Mrs. Samuels. Respondent subsequently acknowledged there was no factual basis for this claim other than his contention that Jerry's had made no attempt to

resolve the matter before filing suit. Respondent had no evidence of Mrs. Samuels seeking medical treatment or suffering medical damages as a result of being served with the lawsuit.

In his Answer and Counterclaim, respondent also contended Mrs. Samuels was forced to disclose the existence of the lawsuit to potential creditors, resulting in increased interest rate charges on money borrowed. Thereafter, respondent admitted his wife and he were in the process of purchasing a home in Georgia, and the actual mortgage application was made by him, and not his wife; he was not required, nor did he report, the existence of the lawsuit to any creditor; and there was no increase in interest rate charges as a result of the lawsuit. Respondent stated the disclosure of the existence of the suit was made to a mortgage broker and not the lender. Respondent acknowledged the Unfair Trade Practices claim was without factual basis.

When respondent and his wife moved to Georgia, they left a forwarding address with the Postal Service. Jerry's wrote Mrs. Samuels at the Florence address on July 22, 2004, referencing the Answer and Counterclaim, requesting proof of payment, and asking that she produce a copy of the check and mail or fax it to their office. Respondent never produced a canceled check for Jerry's, nor did he inform Jerry's that his wife's check had never cleared the bank.

Jessie Wall, an employee of Jerry's who prepared and filed the pleadings on behalf of Jerry's in this matter, and the complainant in this action, filed a formal request for production of documents on October 1, 2004, and a motion to compel discovery on November 19, 2004, with the Florence County Summary Court. Both documents sought proof of payment.

Respondent engaged in three instances of ex parte communication with the Florence County Magistrate assigned to the case, Eugene Cooper. The first instance occurred on July 27, 2004, after respondent learned Mrs. Samuels was being held in default and a damages hearing had been scheduled. Respondent telephoned the Florence Summary Court and discussed with Judge Cooper his intent to file a motion to be

relieved from default, and how his Answer and Counterclaim had not been received in a timely manner.

On a second occasion, on May 10, 2005, respondent telephoned the Florence Summary Court to discuss his lack of notice for the jury trial that was scheduled for that day. His call was transferred to Judge Cooper, who suggested to respondent that he contact Wall and explore possible settlement. Respondent telephoned Wall, disclosed to her he had spoken to Judge Cooper, and discussed possible settlement. The conversation broke down, with both parties making accusations. Respondent acknowledged that while Wall was not bound by any rules regarding courtesy and demeanor, he certainly was.

The third ex parte communication occurred shortly thereafter when respondent called Judge Cooper and reported to him that settlement discussions had been unsuccessful. Respondent discussed with Judge Cooper the removal of the matter from his docket because the amount in controversy would likely exceed the jurisdictional limit of the Summary Court. Subsequently, respondent faxed a First Amended Answer and Counterclaim to Judge Cooper, with a copy to Jerry's. Respondent's cover letter disclosed he had spoken to Judge Cooper, and the counterclaims contained in the document sought damages of not less than $7,500. The case was transferred to the Court of Common Pleas.

In the First Amended Answer and Counterclaim, respondent again raised the same issues involving jurisdiction, the method of payment to Jerry's, and the counterclaims for violation of the South Carolina Unfair Trade Practices Act, intentional infliction of emotional distress and outrage, defamation, and abuse of process. Respondent did not assert that his wife's check had not cleared. As with the initial Answer and Counterclaim, respondent later acknowledged there was no valid contention regarding jurisdiction; there was no factual basis for violation of the Unfair Trade Practices Act; and there was no factual basis for the claim of intentional infliction of emotional distress upon Mrs. Samuels.

After the matter was transferred to the Court of Common Pleas, Jerry's retained counsel. The matter was subsequently resolved by a Consent Order transferring the case back to Summary Court, payment of $1,500 by respondent to Jerry's, and the execution of a Consent Order of Dismissal with prejudice, dated July 16, 2007.

In response to Wall's complaint to the Commission on Lawyer Conduct, respondent described the installation of the central air-conditioning system and the subsequent payment. At no point did respondent disclose his wife's check had never cleared the bank. Also, respondent acknowledged Wall's attempt to serve what respondent characterized as formal correspondence seeking proof of payment. In his response to the Commission's notice of full investigation, respondent acknowledged for the first time the check for payment had never cleared his bank. As a result of all of these actions, respondent received an air-conditioning system priced $2,600 for $1,500 and has not fully paid Jerry's for the appliance.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 3.1 (a lawyer shall assert only meritorious claims and contentions); Rule 3.2 (a lawyer shall make reasonable efforts to expedite litigation); Rule 3.3 (a lawyer shall demonstrate candor toward the tribunal); Rule 3.4(a) (a lawyer shall not unlawfully obstruct another party's access to evidence); Rule 3.4(d) (a lawyer shall make a reasonably diligent effort to comply with a legally proper discovery request); Rule 4.1(a) (a lawyer shall not make false statements of material fact); and Rule 8.4(a) (professional misconduct).

Respondent's misconduct constitutes grounds for discipline under Rule 7(a)(1), 7(a)(5), and 7(a)(6) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct).

Conclusion

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his actions. We further order respondent to make a payment of $1,100, plus interest from June 15, 2004, to complainant Jerry's.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Bryan Edward Barrett, Respondent.

Opinion No. 26537
Submitted August 11, 2008 – Filed August 25, 2008

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, of Columbia, for the Office of Disciplinary Counsel.

Bryan Edward Barrett, of Shelbyville, Indiana, pro se.

PER CURIAM: By way of the attached order of the Indiana Supreme Court, respondent was publicly reprimanded.

The Clerk of this Court sent a letter via certified mail to respondent notifying him that, pursuant to Rule 29(b), RLDE, Rule 413, SCACR, he had thirty (30) days in which to inform the Court of any claim he might have that a public reprimand in this state is not warranted and the reasons for any such claim. No response was received. The Office of Disciplinary Counsel filed a response stating it has no information that would indicate the imposition of identical discipline in this state is not warranted.

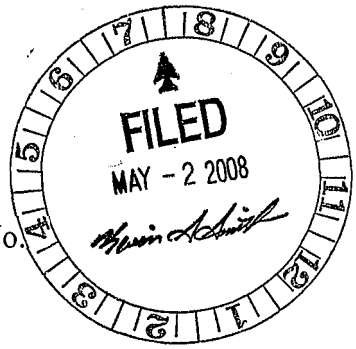
We find a sufficient attempt has been made to serve notice on respondent, and find none of the factors in Rule 29(d), RLDE, Rule 413,

SCACR, present in this matter. We also find a public reprimand is the appropriate sanction to impose as reciprocal discipline in this matter. See In re Brooker, 377 S.C. 7, 659 S.E.2d 110 (2008); In re Stratos, 374 S.C. 212, 648 S.E.2d 607 (2007); In re Screen, 365 S.C. 172, 617 S.E.2d 122 (2005); In re Barr, 361 S.C. 399, 605 S.E.2d 536 (2004).

PUBLIC REPRIMAND.

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

In the
Indiana Supreme Court



In the Matter of:	)	Supreme Court Cause No.
Bryan E. BARRETT,	)	70S00-0801-DI-44
Respondent.	)	

ORDER APPROVING STATEMENT OF CIRCUMSTANCES
AND CONDITIONAL AGREEMENT FOR DISCIPLINE

Pursuant to Indiana Admission and Discipline Rule 23(11), the Indiana Supreme Court Disciplinary Commission and Respondent have submitted for approval a "Statement of Circumstances and Conditional Agreement for Discipline" stipulating agreed facts and proposed discipline as summarized below:

Stipulated Facts: In May 2005, J.R. pled guilty to a crime and was sentenced to 12 years in prison. The Shelby County Public Defender's Office filed a Notice of Appeal one day late and then assigned Respondent to pursue the appeal. After the Court of Appeals dismissed the appeal, Respondent took no further action, even though he could have petitioned for pennission to file a belated notice of appeal. *See* Ind. Post Conviction Rule 2(1). Respondent did not return phone calls from J.R. and his wife, and did not infonn them of the outcome of the appeal.

Facts in aggravation are: (1) Respondent's client was particularly vulnerable because of his incarceration; and (2) Respondent, who has been in practice since 1985, should have known the importance of telling his client about the outcome of his appeal. Facts in mitigation are: (1) Respondent has no prior disciplinary history; and (2) he did not act out of selfish or dishonest motive.

Violations: The parties agree that Respondent violated these Indiana Professional Conduct Rules prohibiting the following misconduct:

1.3: Failure to act with reasonable diligence and promptness.

1.4(a)(3): Failure to keep a client reasonably infonned about the status of a matter.

1.4(a)(4): Failure to respond promptly to reasonable requests for infonnation.

l.4(b): Failure to explain matter to extent reasonably necessary to pennit a client to make infonned decisions.

Discipline: The parties agree the appropriate sanction is a public reprimand. The Court, having considered the submission of the parties, now approves the agreed discipline and imposes **a public reprimand.** The costs of this proceeding are assessed against Respondent.

The Court directs the Clerk to forward a copy of this Order to the hearing officer, to the parties or their respective attorneys, and to all other entities entitled to notice under Admission and Discipline Rule 23(3)(d).

DONE at Indianapolis, Indiana, this 23rd day of May, 2008.

Randall T. Shepard
Chief Justice of Indiana

All Justice concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Eagle Container Co., LLC, and Jeffrey Spotts, as Personal Representative of the Estate of Alfred D. Spotts, Respondents,

v.

County of Newberry, a political subdivision, and Susie Berry, in her capacity as Zoning Administrator of Newberry County, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26538
Heard May 29, 2008 – Filed September 2, 2008

REVERSED

George Robert DeLoach, III, of Merritt, Flebotte, Wilson, Webb & Caruso, of Columbia; and Hardwick Stuart, Jr., of Berry Quackenbush & Stuart, of Columbia, for Petitioner.

Thomas H. Pope, III, of Pope and Hudgens, of Newberry, for Respondent.

Robert E. Lyon, Jr., and M. Clifton Scott, of Columbia, for Amicus Curiae South Carolina Association of Counties.

ACTING JUSTICE KITTREDGE: We granted a writ of certiorari to review the court of appeals' opinion in Eagle Container Co. v. County of Newberry, 366 S.C. 611, 622 S.E.2d 733 (Ct. App. 2005). We are called upon to construe the effect of an amendment to the Newberry County Zoning Ordinance. The Newberry County Council amended the county zoning ordinance on December 11, 2002 by adding a single word—"landfill"—to a list of uses that may be allowed in what is classified as R-2 Rural District. It is undisputed that prior to the amendment, a landfill was permitted in R-2 districts only as a "special exception." The question before us is whether the single-word amendment to the zoning ordinance effected a change in a landfill from a "special exception" to a "permitted use." We hold the amendment had no effect on the proper use classification of a landfill. A landfill remains a "special exception" in R-2 districts. We reverse the contrary opinion of the court of appeals.

I.

Eagle Container owns a 328-acre tract of land in Newberry County which is zoned R-2 Rural District. On May 16, 2003, Eagle Container applied for a special exception to construct and operate a landfill on the property. Before this request was acted upon, Eagle Container apparently learned of the amended ordinance. On June 2, 2003, it applied for, and received, a permit to operate the proposed landfill. Two days later, on June 4, 2003, a representative for Newberry County wrote Eagle Container a letter advising the permit had been issued in error and was being revoked. The letter stated, "Pursuant to Newberry County Zoning Ordinance, landfills are

permitted only in R-2 [d]istricts as special exceptions, which require approval of the Board of Zoning Appeals after a hearing. Consequently, I am hereby reinstating the Special Exception Application filed on May 16, 2003."[1]

On June 17, 2003, Eagle Container filed suit, contending a landfill was a "permitted use" under the ordinance and, as such, the permit should be reinstated. The parties filed cross motions for summary judgment, each contending there were no genuine issues as to any material fact. The circuit court granted Eagle Container summary judgment, ruling a landfill is a "permitted use" within the meaning of the County's recently amended ordinance. The County appealed, and the court of appeals affirmed. Eagle Container Co. v. County of Newberry, 366 S.C. 611, 622 S.E.2d 733 (Ct. App. 2005).

II.

Because we are called upon to construe the meaning of an unambiguous ordinance, our review does not track the fact-based summary judgment review path.[2] Issues involving the construction of ordinances are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact. Sea Island Scenic Parkway Coalition v. Beaufort County Bd. of Adjustments & Appeals, 321 S.C. 548, 550, 471 S.E.2d 142, 143 (1996). "Although great deference is accorded the decisions

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[1] The record on appeal does not contain the "Special Exception Application filed on May 16, 2003." It is undisputed that the County revoked the permit approval on the basis that a landfill is a "special exception" in the R-2 District.

[2] When reviewing a fact-based grant of summary judgment, an appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 659 S.E.2d 496 (2008). Under Rule 56(c), SCRCP, summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

of those charged with interpreting and applying local zoning ordinances, 'a broader and more independent review is permitted when the issue concerns the construction of an ordinance.'" Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995) (internal citation omitted) (quoting Sea Island Scenic Parkway Coalition v. Beaufort County Bd. of Adjustments & Appeals, 316 S.C. 231, 235, 449 S.E.2d 254, 256 (Ct. App. 1994)). "The determination of legislative intent is a matter of law." Id.

III.

We begin our analysis with the procedural history which led to the December 11, 2002 amendment to the Newberry County Zoning Ordinance that is at the center of this dispute. In December 2001, Newberry County adopted Zoning Ordinance No. 12-24-01 to provide a comprehensive plan for land uses and restrictions in Newberry County. Article 3 of the ordinance establishes zoning districts. The various zoning districts were established "for the purposes of guiding development . . . and promoting public health, safety, morals, convenience, order, appearance, prosperity, and general welfare . . . ."

Section 301 sets forth a nonexclusive listing of what uses may be allowed in the respective zoning districts. When the ordinance was enacted, R-2 Rural Districts were defined in section 301 as follows:

> R-2 districts require large parcels for uses, allow rural and residential uses, including manufactured homes on individual lots, agricultural and related uses, ranching, recreation and hunting, a variety of government service uses, and limited business uses.

The ordinance provides for three classifications of uses that may be permitted: a "permitted use," a "conditional use," or a "special exception." These terms of art are defined in Article 2 of the zoning ordinance and are applied to the specific uses in Article 5, specifically section 501:

1. Permitted Uses: Permitted uses listed in the district use tables in this Division are **permitted** outright.

2. Conditional Uses: Conditional uses in the district use tables are **permitted** by the Zoning Administrator without further review upon compliance with the conditions specified in the tables.

3. Special Exceptions: Special exceptions are **permitted** after review and approval by the Board of Zoning Appeals upon compliance with the general conditions in the regulations.

(Emphasis added.)

The County amended section 301 on December 11, 2002 by adding "landfill" as a use allowed in R-2 Rural Districts. The amendment reads:

WHEREAS, Ordinance No. 12-24-01 permits various uses in R-2 Rural Districts; and

WHEREAS, landfills should be allowed in the R-2 Rural Districts.

NOW, THEREFORE, BE IT ORDAINED AS FOLLOWS:

Article 3, Section 301 is amended to add text **"landfill"** to the uses permitted in R-2 Rural District. The text is added to the Newberry County Zoning Ordinance.

(Last emphasis added.)

It is undisputed that prior to this amendment a landfill was allowed in R-2 districts only as a "special exception" under section 501. Section 501 sets forth the following conditions for approval of a landfill within R-2 districts by the Board of Zoning Appeals:

(1) Approvals shall be conditioned on the applicant receiving all state and federal approvals;
(2) All uses are a minimum of 1,000 feet from adjoining property lines;
(3) The use would not constitute a safety hazard or a traffic hazard;
(4) The use is not detrimental to adjacent land uses in the vicinity.

When Eagle Container's post-amendment permit application was ultimately treated by the County as an application for a "special exception," Eagle Container filed the underlying action in circuit court seeking declaratory relief and mandamus. Eagle Container successfully argued in the circuit court that the single-word amendment to section 301 changed landfills from a "special exception" to a "permitted use." The court of appeals affirmed, from which we granted a writ of certiorari.

The dispositive question is whether the Newberry County Council, in amending section 301, changed landfill from a "special exception" to a "permitted use."

We proceed from the familiar premise that in the area of statutory construction, our role is limited to determining legislative intent and effectuating that intent. "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." McClanahan v. Richland County Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002).

"[W]ords in a statute must be construed in context," and "the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute." S. Mut. Church Ins. Co. v. S.C. Windstorm & Hail Underwriting Ass'n, 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991). "The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

"If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." Miller v. Doe, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994).

Both the circuit court and the court of appeals construed the phrase "uses permitted" in the descriptive language of the announcement setting forth the amendment as unambiguously reflecting the intent of County Council to change the classification of a landfill in R-2 districts from a "special exception" to a "permitted use." In so ruling, the courts erroneously elevated the significance of this prefatory, nonbinding language. In any event, such a construction cannot withstand scrutiny, because reference to an allowed use as a "use permitted" is not the same thing as the term of art "permitted use."[3] In fact, each of the three use classifications (permitted,

[3] We, too, view the intent of County Council as unambiguous, and when we examine the purpose of Article 3 of the ordinance juxtaposed to Article 5, we conclude that Article 3 is not intended to distinguish the various classifications of uses allowed. As the court of appeals correctly observed, "Article 3 of the Zoning Ordinance establishes zoning districts and lists the general purposes for each zoning district. . . . Article 5 sets forth the zoning district regulations [and] [s]ection 500 classifies three types of uses for the zoning districts . . . ." Eagle Container, 366 S.C. at 617, 622 S.E.2d at 736. A review of the various districts listed in section 301 reveals a collection of uses without regard to classification as permitted, conditional or special exception. The proper use classification of allowed uses is the very function of Article 5, specifically section 501. Moreover, were we to find an ambiguity as a result of the amendment to section 301, the result would not change. It is clear that the County amended the ordinance with full knowledge that a landfill was a "special exception" in R-2 Districts. Prior to the passing of the amended ordinance, the Newberry County Planning/Zoning Director explained:

> This has been a source of confusion for some applicants who were interested in finding out what was permitted in R-2 and where in particular landfills were permitted. We thought it might

conditional and special exception) incorporates the term "permitted" by definition. Referring to any allowed use as a "use permitted" sheds no light on the proper classification of the use. Under the clear and unambiguous approach utilized by the Newberry County Zoning Ordinance, it is section 501, not section 301, that determines whether an allowed use is classified as a "permitted use," "conditional use," or "special exception."

Moreover, neither the circuit court nor the court of appeals was persuaded by County Council's failure to amend section 501 of the ordinance, which lists a landfill as a special exception. In this regard, the court of appeals invoked the principle of "last legislative expression" to confer a landfill as a "permitted use." "Under the 'last legislative expression' rule, where conflicting provisions exists, the last in point of time or order of arrangement, prevails." Ramsey v. County of McCormick, 306 S.C. 393, 397, 412 S.E.2d 408, 410 (1991). The last legislative expression rule, however, "is purely an arbitrary rule of construction and is to be resorted to only when there is clearly an irreconcilable conflict, and all other means of interpretation have been exhausted." Feldman v. S.C. Tax Comm'n, 203 S.C. 49, 54, 26 S.E.2d 22, 24 (1943). Here, there is no irreconcilable conflict. Because Articles 3 and 5 of the zoning ordinance serve different functions, the amendment at issue here creates no conflict as to the proper use classification of a landfill in a R-2 district.

> need to be added as a clarification only. It is not adding the use to the district; the district already has that use as a Special Exception.

Notably, these recorded statements were made at a County Council meeting during a reading of the amended ordinance. In any event, were we to indulge in the fiction that the amendment to section 301 created a conflict within the ordinance, the ordinance itself provides the manifest legislative intent for the resolution of any such conflict. Article 4, section 400, of the ordinance requires "the most restrictive . . . standards shall govern" in the event of a conflict among provisions.

The court of appeals further held that "the amending ordinance directly contradicts section 501's classification of landfills thereby repealing the classification and obviating the need to consider the existence of the 'special use' requirements." Eagle Container, 366 S.C. at 626, 622 S.E.2d at 741. From this finding, the court of appeals held that the amendment to section 301 repealed section 501. Id. This was error, for the reasons noted above. Succinctly stated, the addition of the term "landfill" in the listing of allowed uses in section 301 creates no conflict within the ordinance. Article 3 of the zoning ordinance simply does not speak to the proper use classification of allowed uses within the various zoning districts; the proper use classification is the function of Article 5. Given the different purposes served by Articles 3 and 5, the single-word amendment to section 301 may be easily reconciled with the balance of the ordinance, specifically including Article 5 and section 501. See, e.g., Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., 368 S.C. 137, 141-42, 628 S.E.2d 38, 41 (2006) ("Repeal by implication is disfavored, and is found only when two statutes are incapable of any reasonable reconcilement. Moreover, the repugnancy must be plain, and if the two provisions can be construed so that both can stand, a court shall so construe them." (internal citation omitted)).

IV.

We readily acknowledge this statutory construction dispute was fostered by the actions of Newberry County, especially the initial granting of Eagle Container's permit application. Nevertheless, well established principles of statutory construction dictate the result we reach today.

In sum, the Article 3, section 301, listing of uses permitted has no bearing on the proper use classification of an allowed use as a "permitted use," a "conditional use," or a "special exception." We hold the mere addition of the word "landfill" to the listing in section 301 of uses permitted did not alter the use classification of a landfill. Use classification is governed by Article 5, and accordingly, a landfill remains a "special exception" use in R-2 districts.

REVERSED.

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

The Supreme Court of South Carolina

O R D E R

Pursuant to Article V, §4, of the South Carolina Constitution, Rule 607 (h)(1), SCACR, is amended by adding the following:

> (J) The following per page costs apply to requests to produce a transcript on an expedited basis:
>
> > (i) A fee of Four Dollars and Twenty-Five Cents ($4.25) for original transcripts delivered within seven days of the request and Seventy-Five Cents ($.75) for a copy.
> >
> > (ii) A fee of Five Dollars and Twenty-Five Cents ($5.25) for original transcripts delivered overnight and One Dollar ($1.00) for a copy.
> >
> > (iii) A fee of Six Dollars and Twenty-Five Cents ($6.25) for original transcripts delivered on a daily basis and One Dollar ($1.00) for a copy.

This amendment is effective immediately, and is applicable to all requests received by a court reporter on or after the date of this order.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

August 27, 2008

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

New Hope Missionary Baptist Church, Respondent,

v.

Paragon Builders, and Kenneth W. Rose, Defendants,

of whom Paragon Builders is the Appellant.

Appeal From Lancaster County
Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 4433
Submitted May 1, 2008 – Filed August 27, 2008

REVERSED

James Mixon Griffin, of Columbia; for Appellant.

Philip E. Wright, of Lancaster; for Respondent.

THOMAS, J.: Paragon Builders appeals the trial court's denial of its motion to compel arbitration or dismiss the complaint of New Hope Missionary Baptist Church. We reverse.[1]

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

FACTS

Paragon Builders, L.L.C. of Orangeburg, South Carolina, signed a contract with New Hope Missionary Baptist Church (Church) on or between September 30 and October 3, 2004. The two-page Contract was entitled a "Construction Management Agreement" wherein Paragon Builders avowed to help bring the construction of a new church facility "online" by working as "the chief construction advisor." Under the Contract, Paragon Builders pledged to work with the Church's architect in North Carolina, appointed church leaders, state and local building inspectors, local city and county governments, utilities, bankers and others associated with the project.

Article 2 of the Contract, entitled "Time of Completion," contained an arbitration clause stating, "[a]ll disputes hereunder shall be resolved by binding arbitration in accordance with the rules of the American Arbitration Association." The Contract also provided that the Church would pay Paragon Builders twenty-five thousand dollars ($25,000) but that "if for any reason this project is not constructed by Paragon Builders all money will remain with the contractor" and the Church "will not receive any funds back." Payment of the entire $25,000 amount was due at the signing of the Contract.

The Contract was signed by Kenny W. Rose and Emoray R. Waiters, allegedly on behalf of the Church.[2] At some point, a payment of twenty-five thousand dollars was made from Church funds to Paragon Builders. Thereafter, the Church filed a declaratory judgment action asking the court to determine the existence, validity, and enforceability of the Contract.

The Church's complaint raised numerous issues regarding the validity of the Contract, including the absence of any meeting of the minds, Paragon

[2] In the Record on Appeal, a single page bearing twenty-eight signatures has been attached to the Contract. The page bears no identifying marks or explanation regarding the identity of the twenty-eight signatories or why twenty-eight individuals signed the blank sheet of paper.

Builders' lack of consideration, and the ambiguity of the Contract with regard to Paragon Builders' obligations. The Church asserted the $25,000 payment and ensuing deposit were not authorized by the Church but was "the misguided action of the church financial secretary acting ex officio." The complaint prayed for a refund of the $25,000 payment.

The complaint contended neither Rose[3] nor Waiters was a "trustee[] of the church nor were they authorized by the church to enter into any such contract." Waiters' signature was also claimed to be a forgery. The Church contended the signatures on a blank page attached to the Contract were "simply a list of people who attended a meeting regarding the contract" and did not constitute a signature page which was part of the Contract. The Church asserted the Contract "was not approved by any vote of the church or any authorized committee or organization of the church" and as such does not bind the Church.

Paragon Builders timely answered denying the Church was entitled to a declaratory judgment or a refund. The Answer also pled an affirmative defense pursuant to Rule 12(b)(6), SCRCP, that the Church failed to state a claim upon which relief can be granted, and that the Church's claims were subject to arbitration under the Contract.

On July 3, 2006, Paragon Builders filed a Motion to Compel Arbitration and Dismiss or Stay the Complaint. The motion was heard on October 9, 2006, and subsequently denied. The trial court held, "[u]nder the Federal Arbitration Act and S.C. Code Ann. § 15-48-10, before arbitration may be compelled, there must be a determination that there was an agreement between the parties," and this was the very issue the Church contested. The trial court further held, "until there is a determination by the Court as to

[3] The Church further explained that although Rose was the pastor when the Contract was signed, there was an ongoing dispute with Rose at that time, and "ninety-nine percent of the activity that related to this Contract took place directly between the pastor and the contractor," without any information being relayed to the Church.

whether or not the parties had an agreement, arbitration cannot be compelled." Paragon Builders now appeals.

STANDARD OF REVIEW

Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Appeal from the denial of a motion to compel arbitration is subject to de novo review. Chassereau v. Global Sun Pools, Inc., 373 S.C. 168, 171, 644 S.E.2d 718, 720 (2007). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. Thornton v. Trident Med. Ctr., L.L.C., 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003).

LAW/ANALYSIS

Paragon Builders claims the trial court erred in denying its Motion to Compel Arbitration brought pursuant to Section 15-48-20(a) of the South Carolina Code (2005). Specifically, Paragon Builders asserts the Contract's arbitration clause requires disputes arising out of the Contract be resolved through arbitration. Pursuant to Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967), and The Housing Authority of City of Columbia v. Cornerstone Housing, L.L.C., 356 S.C. 328, 588 S.E.2d 617 (Ct. App. 2003), we find the trial court erred in denying Paragon Builders' Motion to Compel Arbitration since the Church failed to specifically challenge the arbitration agreement.

Section 15-48-10(a) of the South Carolina Code (2005) states, "[a] written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." The Legislature also provided that:

> On application of a party showing an [arbitration] agreement described in § 15-48-10, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

S.C. Code Ann. § 15-48-20(a) (2005). An order denying a motion to compel arbitration[4] made under Section 15-48-20 is immediately appealable. S.C. Code Ann. § 15-48-200(a)(1) (2005); Towles v. United HealthCare Corp., 338 S.C. 29, 35, 524 S.E.2d 839, 842-43 (Ct. App. 1999).

As a preliminary note, we find the trial court properly determined the Federal Arbitration Act ("FAA") applies to the arbitration agreement in this matter since the parties did not contract to the contrary and the arbitration agreement pertains to a transaction involving interstate commerce due to the nature of the construction project, Paragon Builders' position as chief construction advisor, and Paragon Builders' affidavit swearing the project will involve businesses and supplies from outside South Carolina. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538-39, 542 S.E.2d 360, 363 (2001) ("Unless the parties have contracted to the contrary, the FAA applies in federal or state courts to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction."); Episcopal Hous. Corp. v. Federal Ins. Co., 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) ("It would be virtually impossible to construct an eighteen (18) story apartment building between 1971 and 1973 with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina."); Blanton v.

[4] This court also recently dealt with a motion to compel arbitration in Partain v. Upstate Automotive Group, Op. No. 4373 (S.C. Ct. App. filed April 23, 2008) (Shearouse Adv. Sh. No. 16 at 69).

Stathos, 351 S.C. 534, 540-41, 570 S.E.2d 565, 568-69 (Ct. App. 2002) (holding Blanton's affidavit asserting the contract affected interstate commerce, Stathos's failure to dispute the affidavit, and the nature of the construction project were sufficient to uphold the decision of the circuit court that the contract evinces a transaction involving interstate commerce); Towles, 338 S.C. at 36, 524 S.E.2d at 843 ("Because interstate commerce is involved, the FAA applies and displaces South Carolina's Uniform Arbitration Act.") (citing Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 459-60, 476 S.E.2d 149, 152 (1996)).

Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001); Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); Chassereau v. Global Sun Pools, Inc., 373 S.C. 168, 171-72, 644 S.E.2d 718, 720 (2007). Since the Church contends a valid, enforceable contract does not exist, this is no doubt one reason why the trial court denied Paragon Builders' Motion to Compel Arbitration until the court could determine whether or not the parties had an agreement. However, further examination of case law from the United States Supreme Court and the South Carolina Supreme Court yields the surprising result that when a party argues fraud in the inducement of an entire contract, but not the arbitration agreement itself, arbitration cannot be avoided. Prima Paint, 388 U.S. 395; S.C. Pub. Serv. Auth. v. Great Western Coal, Inc., 312 S.C. 559, 437 S.E.2d 22 (1993); Jackson Mills, Inc. v. BT Capital Corp., 312 S.C. 400, 440 S.E.2d 877 (1994); Cornerstone Hous., 356 S.C. 328, 588 S.E.2d 617 (Ct. App. 2003).

In Prima Paint, 388 U.S. at 403-04, the United States Supreme Court held that general allegations of fraud in the inducement of a contract are insufficient to prevent the invocation of a contract's arbitration clause. The court referenced Section 4[5] of the FAA and concluded that with respect to cases evidencing transactions in commerce:

[5] Section 4 provides in part, "The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to

> if the claim is fraud in the inducement[6] of the arbitration clause itself – an issue which goes to the 'making' of the agreement to arbitrate – the federal court may proceed to adjudicate it . . . [b]ut the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.

388 U.S. at 403-04. In Great Western Coal, Inc., 312 S.C. at 562-63, 437 S.E.2d at 24 (emphasis added), the South Carolina Supreme Court explained how the rule of Prima Paint should be applied by our courts:

> We join the jurisdictions which have rejected limiting the holding in Prima Paint. We hold a party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause. Fraud as a defense to an arbitration clause must be fraud specifically as to the arbitration clause and not the contract generally.

A party may allege the arbitration agreement was never entered into and "under such circumstances, a challenge to the existence of the arbitration agreement itself becomes a matter to be 'forthwith and summarily tried' by

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comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement . . . [i]f the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof." 9 U.S.C.A. § 4 (2008).

[6] The Church's complaint and brief to this court set forth arguments such as, an absence of any meeting of the minds, a lack of the signatories' ability to bind the Church, forgery, and failure of the Church to approve the Contract, all of which deal with fraud in factum, i.e., ineffective assent to the Contract. Great Western Coal, 312 S.C. at 562, 437 S.E.2d at 24.

the Court." Jackson Mills, 312 S.C. at 404, 440 S.E.2d at 879 (citations omitted).

In its complaint, at the hearing, and in its brief to this court, the Church does not specifically allege the arbitration clause in the Contract is invalid, unenforceable, or does not exist. Instead, the Church argues it has numerous grounds on which the Contract is invalid and that "the Contract simply does not exist as a Contract" in part because of Rose's inability to bind the Church.

We acknowledge the United States Supreme Court has identified certain limited circumstances in which "courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter (in the absence of 'clear and unmistakable' evidence to the contrary)." Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452 (2003). These "gateway matters" include whether the parties have a valid arbitration agreement or whether a binding arbitration clause applies to a certain type of controversy. Id. However, in the present case we are not confronted with the question of whether an arbitration agreement encompasses a certain dispute[7] or whether the arbitration agreement is invalid. Instead, we have been presented with the question of whether arbitration should be compelled when a contract's validity has been challenged.

Common sense implies that if a party challenged the validity of a contract which contained an arbitration clause, the validity of the arbitration clause is also challenged. The courts have found otherwise. "Arbitration

[7] "Determining whether a party agreed to arbitrate a particular dispute is an issue for judicial determination to be decided as a matter of contract." Towles, 338 S.C. at 41, 524 S.E.2d at 846. Whether a particular claim is subject to arbitration has been examined in many cases, including, Aiken, 373 S.C. 144, 644 S.E.2d 705; Chassereau, 373 S.C. 168, 644 S.E.2d 718; Zabinski, 346 S.C. 580, 553 S.E.2d 110; Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642 (1993); Vestry & Church Wardens of the Church of the Holy Cross v. Orkin Exterminating Co., 356 S.C. 202, 588 S.E.2d 136 (Ct. App. 2003). This issue is not presently before the court.

clauses are separable[8] from the contracts in which they are imbedded." Jackson Mills, 312 S.C. at 403, 440 S.E.2d at 879 (citing Prima Paint, 388 U.S. at 402). An arbitration clause's validity is distinct from the substantive validity of the contract as a whole. Cornerstone Hous., 356 S.C. at 338, 588 S.E.2d at 622 (citing Munoz, 343 S.C. at 540, 542 S.E.2d at 364). "Even if the overall contract is unenforceable, the arbitration provision is not unenforceable unless the reason the overall contract is unenforceable specifically relates to the arbitration provision." Cornerstone Hous., 356 S.C. at 340, 588 S.E.2d at 623.

The policies of the United States and this State favor arbitration of disputes. Stokes v. Metropolitan Life Ins. Co., 351 S.C. 606, 610-11, 571 S.E.2d 711, 713-14 (Ct. App. 2002); Tritech Elec., Inc. v. Frank M. Hall & Co., 343 S.C. 396, 399, 540 S.E.2d 864, 865 (Ct. App. 2000) (citation omitted); Towles, 338 S.C. at 37, 524 S.E.2d at 844. "The FAA was designed 'to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate.'" Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989) (citation omitted). The Church's argument that the entire Contract is invalid can be considered at the arbitration itself. Cornerstone Hous., 356 S.C. at 340, 588 S.E.2d at

[8] In Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007), the South Carolina Supreme Court recently noted that severability is not always an appropriate remedy for an unconscionable provision in an arbitration clause especially in situations where "'illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts.'" 373 S.C. at 34, 644 S.E.2d at 673. This situation is not presently before us since the Church has made no claims regarding the unconscionability of its Contract with Paragon Builders. The supreme court emphasized the importance of a case-by-case analysis to address unique circumstances surrounding the evaluation of an arbitration clause for unconscionability and further distinguished Simpson from cases such as the one sub judice by holding the arbitration clause in Simpson is unconscionable due to a multitude of one-sided terms. Id. at 36, 644 S.E.2d at 674.

623; see Bazzle, 539 U.S. 444, 453 (noting arbitrators are well suited to address issues such as contract interpretation and arbitration procedures).

We further acknowledge that "where there has been no agreement to arbitrate, a party cannot be forced into compulsory arbitration." Hilton Head Resort Four Seasons Ctr. Horizontal Prop. Regime Council v. Resort Inv. Corp., 311 S.C. 394, 397-98, 429 S.E.2d 459, 462 (Ct. App. 1993) (citation omitted). Again, precedent forces a distinction to be drawn between disputes in which a party challenges the arbitration agreement itself and disputes in which only the overall contract is challenged. See Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 23-24, 644 S.E.2d 663, 668 (2007) (holding the trial court was the proper forum for determining the enforceability of the arbitration clause in the contract because "[a]lthough the clause specifically stated that arbitration applied to issues involving 'the validity and scope of this contract,' Simpson challenged the validity of the arbitration provision on grounds of unconscionability, bringing into question whether an arbitration agreement even existed in the first place"); Cornerstone Hous., 356 S.C. at 338-42, 588 S.E.2d at 622-24 (holding because a party did not directly challenge the arbitration agreement in either of the two contracts, the legality and enforceability of the contracts is an issue for the arbitrator to decide). Indeed, even Section 15-48-20(a) of the South Carolina Code (2005) notes when a party presents a court with an arbitration agreement and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration unless "the opposing party denies the existence of the agreement to arbitrate." S.C. Code Ann. § 15-48-20(a) (2005) (emphasis added). Unlike the cases argued by the Church, the matter presently before us does not raise the issue of whether the arbitration clause in Article 2 of the Contract is invalid. Accordingly, the order of the trial court is

REVERSED.

WILLIAMS, J., concurs.

PIEPER, J., dissents in a separate opinion.

PIEPER, J., dissenting:

I respectfully dissent. In my opinion, this case involves more than a situation where a party alleges fraud in the inducement of just the contract itself, as opposed to challenging the arbitration provision of the contract. I believe the Church has raised a colorable claim that there was no arbitration agreement by alleging the signer of the agreement had neither the authority to agree to the contract itself, nor the authority to agree to the arbitration provision.

I fully support the policy in favor of arbitration and will not resort to citation of the law in this regard. I believe the majority opinion fully recounts the applicable law. However, the majority notes that where there has been no agreement to arbitrate, a party cannot be forced to do so. I believe further clarification of the law in this area is necessary. Based on the facts of this case, I find it very problematic that a person, without authority, may set out to not only bind another to a contract, but also to arbitration without the right to do so, and without a preliminary court determination on the issue of the authority to bind (i.e. the existence of the agreement to arbitrate). Under the facts herein, I respectfully believe this case falls within that type of "gateway matter" ripe for a judicial determination as to the existence of the agreement to arbitrate. See Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) (stating where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place); see also 9 U.S.C.A. § 4 (2008) (wherein the Federal Arbitration Act directs the court to summarily determine the existence of the arbitration agreement if it is at issue); accord S.C. Code Ann. § 15-48-20(a) (2005).

Moreover, the circuit court did not rule that arbitration may not eventually result; instead, the court concluded that a preliminary and threshold determination must be made about the existence of an agreement to arbitrate. Once that threshold determination is made, I do not read the court's order as precluding arbitration if the issue as to the authority to enter the agreement to arbitrate is determined adversely to the Church. Therefore, I agree with the assertion by the Church in its brief that the appeal is premature.

Accordingly, I would affirm.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ex Parte: Joe W. Kent,	Appellant/Respondent.
Leroy E. Capps and Harriette Capps,	Respondents,
v.	
South Carolina Department of Transportation,	Respondent/Appellant.

Appeal From Florence County
J. Michael Baxley, Circuit Court Judge

Opinion No. 4434
Submitted May 1, 2008 – Filed August 28, 2008

AFFIRMED IN PART AND REVERSED IN PART

Charles E. Carpenter, Jr. and Carmen V. Ganjehsani, both of Columbia, for Appellant-Respondent.

William P. Hatfield, of Florence, for Respondents.

D. Malloy McEachin, of Florence, for Respondent-Appellant.

WILLIAMS, J.: In this case, the trial court granted a new trial and issued sanctions for contempt. We affirm in part and reverse in part.

FACTS

This case arises from a motor vehicle accident. A tractor trailer truck driven by Bobby Connor (Connor) made a turn while on a detour road. While making the turn, Connor traversed into the opposing lane of travel. Leroy E. Capps and Harriette Capps (collectively the Capps) were traveling in the opposing lane when the tractor trailer collided with the Capps' vehicle. The Capps filed suit against Connor and the South Carolina Department of Transportation (the SCDOT).[1]

As a basis of their suit, the Capps alleged the SCDOT: (1) knowingly selected a route which could not safely accommodate tractor trailers because the tractor trailers would encroach into the opposing lane of travel; (2) failed to place advance warning signs alerting oncoming motorists of this danger; and (3) failed to modify the detour route to make it safer or failed to choose a safer alternative route.

During the trial, the SCDOT attempted to assert Connor's superseding negligence as a defense. In support of this defense, the SCDOT retained the services of Joe Kent (Kent). Kent is an expert in accident reconstruction and highway engineering related to accidents. Kent testified that an accident report was important in forming the foundation for his opinions.

When asked what factors within the accident report he relied on in arriving at his conclusion, Kent responded, "The orientation of the vehicles and the motion of the vehicles. . . . There was also an estimated speed . . . of 45 [MPH] for Mr. Capps and five [MPH] for [Conner]. . . . I also noted (sic) that from this report that [Conner] was cited for failure to yield right of way." The Capps immediately moved for a mistrial, arguing evidence of whether

[1] The Capps pursued a case against Connor in federal district court.

Conner received a ticket was inadmissible. The trial court denied the Capps' motion for a mistrial but did issue a curative instruction to the jury. Additionally, the trial court issued contempt sanctions in the amount of $1,500 against Kent. Initially, the trial court ordered Kent to pay this amount to the Florence County Humane Society. Subsequently, the trial court determined that payment to the Humane Society did "not further the ends of justice" and ordered payment be made to the Capps' counsel.

The jury returned a verdict in favor of the SCDOT. The Capps moved for a new trial pursuant to Rule 59, SCRCP, and separately under the thirteenth juror doctrine. The Capps specifically asked the trial court to reconsider its denial of the Capps' motion for a mistrial. The trial court granted the Capps' motion for a new trial. Kent and the SCDOT appeal the trial court's rulings. We address each parties' argument in turn.

A. Kent's appeal

Kent argues the trial court committed reversible error when it issued contempt sanctions against him. We agree.[2]

The determination of contempt ordinarily rests within the sound discretion of the trial judge. State v. Bevilacqua, 316 S.C. 122, 129, 447 S.E.2d 213, 217 (Ct. App. 1994). Contempt is an extreme measure and the power to find an individual in contempt is not to be lightly asserted. Id. at 128, 447 S.E.2d at 216. Contempt results from the willful disobedience of a court order and before a person may be held in contempt, the record must be clear and specific as to acts or conduct upon which the contempt is based. Id. at 129, 447 S.E.2d at 217. A willful act is an act "done voluntarily and intentionally with the specific intent to do something the law forbids, or with

[2] The Capps contend this issue is not preserved for review; we disagree. The issue of whether the sanctions were proper was raised to and ruled upon by the trial court; thus, it is preserved for our review. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (holding for an issue to be preserved for appeal it must have been raised to and ruled upon by the trial judge).

the specific intent to fail to do something the law requires to be done; that is to say with bad purpose either to disobey or disregard the law." Id. (internal quotations omitted). If the primary purpose of the sanctions imposed is to preserve the court's authority and to punish for disobedience of its orders, the contempt is considered criminal. Id. at 128, 447 S.E.2d at 217. Conversely, if the purpose of the sanctions is to coerce obedience to a court order, the contempt is civil. Id. at 129, 447 S.E.2d at 217.

In the instant case, the trial court issued contempt sanctions upon Kent on the basis that Kent deliberately gave inadmissible testimony in the form of Conner's citation. In issuing contempt sanctions, the trial court reasoned that Kent had substantial and continuous involvement in court proceedings as an expert witness over a number of years and should have known that evidence regarding a citation was inadmissible. The following colloquy during the trial indicates the trial court made no inquiry to determine Kent's knowledge regarding the admissibility or inadmissibility of a citation.

> Q: Did you . . . review . . . the accident report in regard to this case?
>
> [Kent]: I did.
>
> Q: Did that . . . have any significance to you in your evaluation?
>
> A: It does. It has basically a description of the vehicles. It has a description of the motions of the vehicles and also it helps clarify the pictures of the accident scene taken by the State Patrol right after that accident that I reviewed. And it reveals in the narrative portion--
>
> [Counsel for the Capps]: I'm going to object. That's hearsay, if your honor please.
>
> [Counsel for the SCDOT]: Your honor, may I respond now?
>
> The Court: Yes, sir.

[Counsel for the SCDOT]: Let me get the rule out but under the rule an expert is entitled to rely on hearsay.

The Court: There is a distinction between relying on it and publishing it counsel.

[Counsel for the Capps]: Plus there's a specific statute.

The Court: What says [sic] you? What say you to that?

[Counsel for the SCDOT]: Your honor I think he would be entitled to testify if he had figures regarding speed for instance. I think he would be able to rely on that and say that's what he relied on in regard to – to a speed. I think he would be able to testify as to how he arrived at his opinion just as the plaintiff's expert testified relying on hearsay.

The Court: All right. Counsel, I'm going to **overrule your objection and allow that**. Again the basis of his opinion is for the jury to determine whether or not that opinion is credible or believable. The court will allow that. You may proceed [Counsel for the SCDOT].

[Counsel for the SCDOT]: Thank you, your honor.

Q: In . . . examining the accident report were there factors that you relied on in arriving at your conclusion in this case?

A: There were.

Q: All right, sir. And . . . what were those?

A: The orientation of the vehicles and the motion of the vehicles as described in the narrative portion and as shown in the diagram. There also was an estimated speed listed by the

> investigating officer of 45 miles per hour for Mr. Capps and fives miles an hour for Mr. Connor who was driving the tractor trailer who pulled out onto Highway 51. I also noted that – from this report that Mr. Conner was cited for failure to yield right of way.

(emphasis added)

Based upon the testimony at trial and the evidence in the record, we find there is not sufficient evidence to suggest that Kent, in fact, knew the testimony was inadmissible or that he willfully disobeyed a court order. See Curlee v. Howle, 277 S.C. 377, 382, 287 S.E.2d 915, 918 (1982) ("Contempt results from the willful disobedience of an order of the court, and before a person may be held in contempt, the record must be clear and specific as to the acts or conduct upon which such finding is based."); see also State v. Passmore, 363 S.C. 568, 571-72, 611 S.E.2d 273, 275 (Ct. App. 2005) (applying the requirement of willfulness in the context of criminal contempt). Furthermore, there was no court order forbidding Kent's testimony. In fact, the trial court allowed Kent to testify after overruling the Capps' objection regarding Kent's ability to rely on the narrative portion of the accident report. Kent was not asked a question to which there was a sustained objection and thereafter answered without a ruling from the trial court. Rather, the trial court overruled the objection and allowed Kent to testify.

While we are mindful of the trial court's concern and recognize the possibility of such knowledge of inadmissible evidence by an individual who regularly appears in court, we nonetheless find the extent of such knowledge for the purposes of determining willfulness must be sufficiently established by the record prior to an imposition of a contempt sanction. The extent of Kent's knowledge was not established in the record and may not be established by speculation. Accordingly, we must confine our review to the record presented. Thus, we hold the trial court's decision to impose contempt sanctions upon Kent lacks evidentiary support and we reverse the sanction.[3]

[3] The dissent characterizes the nature of the contempt involved as civil, rather than criminal. Although the trial judge never characterized the contempt as

Having adjudicated Kent's appeal, we now turn our attention to the SCDOT's appeal.

B. The SCDOT's appeal

The SCDOT appeals the trial court's grant of a new trial arguing the court misapplied the thirteenth juror doctrine and the court's application of the thirteenth juror doctrine was controlled by an error of law. We need not address this issue.

In the instant case, the trial court granted a new trial based on two separate grounds: (1) pursuant to Rule 59, SCRCP; and (2) pursuant to the court's authority under the thirteenth juror doctrine. On appeal, the SCDOT challenges only one of these grounds: the trial court's reliance on the thirteenth juror doctrine. Since the trial court granted a new trial based on Rule 59, SCRCP, and separately under the thirteenth juror doctrine, we must affirm the trial court's decision to grant a new trial on the basis of Rule 59, SCRCP, because that independent ground for a new trial was not also appealed. See Anderson v. Short, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996) (holding when a decision is based on more than one ground, the

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civil or criminal, the movant proceeded as if it were criminal contempt and filed a motion asking the trial court to "reconsider the criminal contempt order." The trial court ultimately issued an order denying reconsideration of the "sanction" imposed but modified its decision as to the payee of the monetary sanction. Arguably, modification of the sanction itself might impact upon its characterization, but the trial court ultimately never characterized its sanction as civil or criminal. While we would normally attempt to ascertain the type of contempt involved for the purposes of our review, we need not characterize the contempt herein in light of our reversal of the sanction since each type of contempt sanction, criminal or civil, requires a finding of willfulness. Therefore, even if we were to agree with the dissent that this proceeding involves civil contempt, we conclude the trial court nonetheless erred in imposing the sanction as the record fails to support a finding of willful conduct.

appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case).

Notwithstanding, even if we were to review the court's use of the thirteenth juror doctrine, we nonetheless would affirm since the court possesses broad, inherent authority to grant a new trial for any prejudicial errors committed during the trial as a matter of fundamental fairness. See Howard v. State Farm Mut. Auto. Ins. Co., 316 S.C. 445, 449, 450 S.E.2d 582, 584-85 (1994) (holding the court may order a new trial based upon the erroneous admission of testimony when the record shows error and prejudice). Moreover, the court retains the inherent authority to reconsider its denial of the motion for a mistrial.

CONCLUSION

Accordingly, the trial court's decision is

AFFIRMED IN PART AND REVERSED IN PART.[4]

PIEPER, J., concurs.

THOMAS, J., concurring in part and dissenting in part by separate opinion:

I respectfully dissent. In my opinion the trial court's ruling should be affirmed in full since the record provides evidence supporting the trial court's issuance of civil contempt sanctions against Kent.

"A determination of contempt is a serious matter and should be imposed sparingly; whether it is or is not imposed is within the discretion of the trial judge, which will not be disturbed on appeal unless it is without evidentiary support." Haselwood v. Sullivan, 283 S.C. 29, 32-33, 320 S.E.2d 499, 501 (Ct. App. 1984). A decision regarding contempt should be reversed

[4] We decide this case without oral arguments pursuant to Rule 215, SCACR.

only if it lacks evidentiary support or the trial judge has abused his discretion. Stone v. Reddix-Smalls, 295 S.C. 514, 516, 369 S.E.2d 840, 840 (1988).

"The power to punish for contempt is inherent in all courts and is essential to preservation of order in judicial proceedings." Browning v. Browning, 366 S.C. 255, 262, 621 S.E.2d 389, 392 (Ct. App. 2005). A court's ability to find someone in contempt "is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts; and consequently to the due administration of justice." In re Terry, 128 U.S. 289, 303 (1888) (citations omitted), quoted with approval in Miller v. Miller, 375 S.C. 443, 453, 652 S.E.2d 754, 759 (Ct. App. 2007). Those who commit offenses calculated to obstruct, degrade, and undermine the administration of justice are subject to the court's inherent authority to levy contempt, and this power cannot be abridged. State ex rel. McLeod v. Hite, 272 S.C. 303, 305, 251 S.E.2d 746, 747 (1979). Without the power to find individuals in contempt of court, "the administration of the law would be in continual danger of being thwarted by the lawless." Miller, 375 S.C. at 453-54, 652 S.E.2d at 759 (citing Terry, 128 U.S. at 303).

Contempt results from the willful disobedience of a court order. Lindsay v. Lindsay, 328 S.C. 329, 345, 491 S.E.2d 583, 592 (Ct. App. 1997). A willful act is one "done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law." Spartanburg County Dep't of Soc. Servs. v. Padgett, 296 S.C. 79, 82-83, 370 S.E.2d 872, 874 (1988) (citing Black's Law Dictionary 1434 (5th ed. 1979)). The determination of contempt ordinarily resides in the sound discretion of the trial judge. State v. Bevilacqua, 316 S.C. 122, 129, 447 S.E.2d 213, 217 (Ct. App. 1994). "A finding of contempt . . . must be reflected in a record that is 'clear and specific as to the acts or conduct upon which such finding is based.'" Tirado v. Tirado, 339 S.C. 649, 654, 530 S.E.2d 128, 131 (Ct. App. 2000) (quoting Curlee v. Howle, 277 S.C. 377, 382, 287 S.E.2d 915, 918 (1982)).

The majority holds the record lacks evidence demonstrating Kent knew a traffic citation is inadmissible in a court of law. I disagree. The majority's

finding disregards the courtroom experience Kent presented while being qualified as an expert witness. During his qualification as an expert witness, Kent explained he has testified "a couple of hundred" times in "the areas of accident reconstruction and roadway effect on vehicular accidents." Kent further explained he has evaluated accidents for twenty-two years and even formed his own engineering firm that engages in accident reconstruction.

The record also evinces the willfulness of Kent's utterance. Ignoring his prior courtroom experience, Kent was still aware of the inadmissibility of accident reports since immediately before he announced, "I also noted that – from this report that Mr. Connor was cited for failure to yield right of way," the Capps' counsel made a hearsay objection to the narrative portion of the accident report being published to the jury and the parties argued about the parameters of Kent's testimony. In the ongoing discussion, the trial court noted "there is a distinction between relying on [the accident report] and publishing it [to the jury]." The Capps' counsel also mentioned that a statute prohibits publishing an accident report to the jury. Indeed, Kent displayed his familiarity with the rules of court by admitting he misspoke and stating he had never done that before. After Kent's statement and the ensuing objection, the jury was removed from the courtroom while the Capps' counsel argued for a mistrial. The attorney for SCDOT responded by stating, "I didn't know that was coming in at that time, your Honor."

The majority also disregards the trial court's extensive explanations to the jury regarding the contemptuous conduct and Kent's willfulness in disclosing Connor's citation to the jury. "[B]efore a court may find a person in contempt, the record must clearly and specifically reflect the contemptuous conduct." Widman v. Widman, 348 S.C. 97, 119, 557 S.E.2d 693, 705 (Ct. App. 2001). The trial court patiently explained to the jury its belief Kent knew the comment was inappropriate and still deliberately mentioned the citation with the knowledge that "evidence of whether or not a citation was issued is just inadmissible in any civil trial." In assessing sanctions against Kent for civil contempt, the trial court explained Kent made a "leap far beyond what the court would ever allow in an intentional way from a witness who's testified many times . . . [and] would well know that evidentiary rule."

The trial court also cited Kent's demeanor, which cannot be reviewed on appeal, as support for holding him in civil contempt.

The majority does not fully address whether the sanctions against Kent constituted civil or criminal contempt. I would find the sanctions were civil in nature. "The determination of whether contempt is criminal or civil depends upon the underlying purpose of the contempt ruling." Miller, 375 S.C. at 456, 652 S.E.2d at 761. "In contempt cases, both civil and criminal relief have aspects that can be seen as either remedial or punitive or both: when a court imposes fines and punishments on a contemnor, it is not only vindicating its legal authority to enter the initial court order, but it also is seeking to give effect to the law's purpose of modifying the contemnor's behavior to conform to the terms required in the order." Hicks v. Feiock, 485 U.S. 624, 635 (1988). "If the sanction is a fine, it is remedial and civil if paid to the complainant even though the contemnor has no opportunity to purge himself of the fine." Miller, 375 S.C. at 457, 652 S.E.2d at 761 (citing Floyd v. Floyd, 365 S.C. 56, 75-76, 615 S.E.2d 465, 475-76 (Ct. App. 2005)).

The trial court never referred to the sanctions as criminal contempt. To the contrary, the trial court made efforts to indicate the contempt was civil in its order denying reconsideration of the sanctions when it stated, "the Court has determined that payment to the Humane Society does not further the ends of justice in this case, and instead directs that the payment be made to Plaintiff's counsel, to be credited against the costs of making and prosecuting the motion for a new trial." See Hicks, at 631 ("If it is for civil contempt the punishment is remedial, and for the benefit of the complainant."); Jarrell v. Petoseed Co., 331 S.C. 207, 209, 500 S.E.2d 793, 794 (Ct. App. 1998) ("Civil contempt sanctions serve two functions: to coerce future compliance and to remedy past noncompliance."). In addition to compensating the Capps for Kent's wrongful conduct, the remedial sanction issued by the trial court also resulted in Kent's continued testimony without further mention of the citation issued to Connor.

In light of this court's standard of review, the support found in the record, and the clear explanations given by the trial court, I would affirm the trial court's order in full.