The Supreme Court of South Carolina

In the Matter of Jerry
W. Craig, Respondent.

ORDER

The records of the office of the Clerk of the Supreme Court show that on September 1, 1972, Jerry W. Craig was admitted and enrolled as a member of the Bar of this State.

By way of Agreement for Discipline by Consent dated July 23, 2002, Mr. Craig has agreed to resign from the South Carolina Bar. We accept Mr. Craig's resignation, effective October 28, 2002, as set forth by this Court in In the Matter of Craig, Op. No. 25546 (S.C. Sup. Ct. filed October 28, 2002).

Mr. Craig shall, within fifteen days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this

State. In addition, his name shall be removed from the roll of attorneys in this State.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

October 28, 2002

The Supreme Court of South Carolina

RE: Filing Indictments With the Clerk of Court

O R D E R

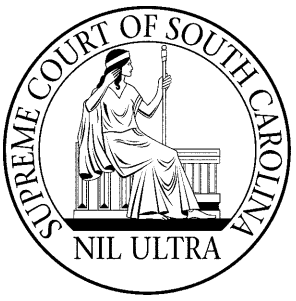
Rule 3(c), SCRCrimP, requires solicitors to file indictments with the Clerk of Court. In some counties, solicitors are retaining the original indictments which have been returned by the grand jury until the proceedings are concluded. This local practice leads to problems and confusion in some cases. Accordingly, effective the date of this order, all original indictments which have been returned by the grand jury shall immediately be filed with the Clerk of Court.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.
Chief Justice Jean H. Toal

Columbia, South Carolina

October 23, 2002



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

October 28, 2002

ADVANCE SHEET NO. 35

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.judicial.state.sc.us

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Tracy O. Trousdell, Appellant,

v.

Al Cannon, Jr., as Sheriff
of Charleston County, Respondent.

Appeal From Charleston County
Roger M. Young, Special Circuit Court Judge

Opinion No. 25540
Heard July 23, 2002 - Filed October 14, 2002

REVERSED AND REMANDED

Johnny F. Driggers, of Charleston, and Daryl G. Hawkins, of Lewis, Babcock & Hawkins, of Columbia, for appellant.

Alexia Pittas-Giroux, of Stuckey Law Offices, L.L.C., of Charleston, for respondent.

Andrew F. Lindemann, of Davidson, Morrison and Lindemann, P.A., of Columbia, for Amicus Curiae

South Carolina Municipal Association and South Carolina Police Chiefs Association.

CHIEF JUSTICE TOAL: The circuit court granted Al Cannon Jr.'s ("Respondent") motion for summary judgment and Tracy O. Trousdell ("Appellant") appeals.

FACTUAL/PROCEDURAL BACKGROUND

Appellant was employed as a highway patrolman for the South Carolina Department of Public Safety. On October 16, 1998, Appellant attempted to pull over a speeding vehicle by turning on his blue lights, wig-wags, and emergency flashers. The offending driver did not pull over and a chase ensued. As he approached the North Charleston city limits, Appellant advised his dispatcher to notify the North Charleston Police Department of the pursuit, but did not request any assistance. Although Appellant did not request it, officers from the North Charleston police department and from the Charleston County Sheriff's Department joined in the chase behind Appellant.

At some point, the offending vehicle began slowing down and eventually came to a complete stop. Before Appellant's cruiser reached a complete stop, the Sheriff's Department's cruiser, driven by Deputy William J. Collins, hit Appellant from behind. Appellant suffered injuries as a result.

Appellant received workers' compensation benefits, including an award of permanent disability, and is no longer employed as a highway patrolman. Appellant sued the Charleston County Sheriff's Department (amended to Al Cannon, Jr., in his capacity as Sheriff). Respondent moved for summary judgment and Appellant moved for partial summary judgment. Special Circuit Court Judge Roger M. Young granted Respondent's motion for summary judgment and denied Appellant's motion for partial summary judgment.

Appellant appeals the following issue:

Did the trial judge err in granting summary judgment for Respondent on grounds that the Fireman's Rule[1] barred Appellant's suit?

LAW/ANALYSIS

Appellant argues that the trial judge erred in finding that South Carolina recognizes the Fireman's Rule, and that it applied to bar Appellant's suit. We agree.

In determining whether summary judgment is proper, this Court must view all evidence in the light most favorable to the non-moving party. *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 543 S.E.2d 563 (Ct. App. 2001). Summary judgment is appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Id.* (citing *City of Columbia v. ACLU of South Carolina*, 323 S.C. 384, 475 S.E.2d 747 (1996)).

This Court has considered the viability of the Fireman's Rule in South Carolina very recently. In *Jeffrey Minnich v. Med-Waste, Inc., and Incendere, Inc.,* Op. No. 25468 (S. C. Sup. Ct. filed May 20, 2002) (Shearouse Adv. Sh. No. 16 at 34)[2], we accepted the following certified question from the United States District Court:

> Does the Fireman's Rule bar an emergency professional, such as a firefighter, police officer, or public safety officer, who is injured as

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[1]The Fireman's Rule is referred to interchangeably as the Firefighter's Rule or the Rescuer's Rule.

[2]Minnich was employed by the Medical University of South Carolina ("MUSC") as a public safety officer. Minnich routinely assisted in loading medical waste onto a tractor trailer owned by Med-Waste, Inc. parked at MUSC, and was injured one day when he had to jump inside the truck to prevent it from rolling into a public street.

> a result of performing his or her duties, from recovering tort based damages from the party whose negligence caused the injury-causing event?

Justice Pleicones, writing for the majority, expressed the holding as follows:

> South Carolina has never recognized the firefighter's rule, and we find it is not part of this state's common law. (citations omitted). In our view, the tort law of this state adequately addresses negligence claims brought against non-employer tortfeasors arising out of injuries incurred by firefighters and police officers during the discharge of their duties. We are not persuaded by any of those courts that recognize the firefighter's rule. The more sound public policy - and the one we adopt - is to decline to promulgate a rule singling out police officers and firefighters for discriminatory treatment.

It is clear from this Court's recent decision in *Minnich* that the Fireman's Rule is not recognized in South Carolina. Accordingly, the trial judge in this case erred to the extent he based his ruling on the Fireman's Rule.[3] The trial judge found Appellant's action was precluded under the Fireman's Rule, but he made some conclusions that cloud his ruling and necessitate further analysis. In part, the order states:

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[3]Further, many jurisdictions that recognize the Fireman's Rule would find it does *not* apply under the circumstances presented in this case where the injuries were not caused by the negligence that necessitated the presence of the police officer (the fleeing suspect), but by an intervening negligent act. *E.g. Garcia v. City of South Tuscon*, 640 P.2d 1117 (Ariz. Ct. App. 1982) (finding negligent shooting of one officer by an officer of a different department to be an intervening act, as it was not the act that occasioned the presence of the injured officer). Moreover, the Fireman's Rule was not created in order to insulate government entities from suit, but to insulate private entities, such as home or business owners, from suit by the fireman when injured in the course of duty on that person's property. *See Minnich*.

> It then follows that the fireman's rule is still good law in South Carolina despite the adoption of the comparative negligence system which bars assumption of the risk as a complete defense. Following this reasoning to its logical conclusion, the fireman's rule does not preclude the plaintiff in this case from recovering for his injuries because he assumed the risks which caused his own negligence to exceed that of the defendant. If that were the theoretical basis it would be a jury's duty to assess the degree of fault. Rather, the fireman's rule precludes the plaintiff from recovering in this case because he cannot show, as a matter of law, that the defendant owed him a duty of care. Since the defendant's duty of care was only to the general public, he does not owe a duty of care to his fellow officers, and thus cannot be found negligent as a matter of law.

(citations omitted). In finding that Respondent did not owe a duty to Appellant, the trial judge cited several cases addressing the "public duty rule" for support.[4] The parties did not address the application of the public duty rule in the memoranda they submitted to the trial court. In our opinion, the trial judge's indirect reference to the public duty rule and conclusion that Respondent did not owe Appellant any duty were misplaced.

In *Arthurs v. Aiken County*, this Court considered the public duty rule and its interplay with the South Carolina Tort Claims Act (Tort Claims Act").[5] 346 S.C. 97, 551 S.E.2d 579 (2001). *Arthurs* confirmed the continuing viability of

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[4]The trial judge cited *Arthurs* and the following cases in a footnote, but never mentioned the public duty rule explicitly in his order: *Tanner v. Florence Co. Treasurer, et. al.*, 336 S.C. 552, 521 S.E.2d 153 (1999); *Jensen v. Anderson County Dep't of Soc. Servs.*, 304 S.C. 195, 403 S.E.2d 615 (1991). After the order was issued, this Court heard *Arthurs v. Aiken County*, 346 S.C. 97, 551 S.E.2d 579 (2001).

[5]S.C. Code Ann. §§ 15-78-10, *et. seq*. (Supp. 2001). This Act defines the parameters of tort liability for governmental agencies in South Carolina.

the public duty rule and its compatibility with the Tort Claims Act, but clarified when the public duty rule is properly raised. *Id.* In this Court's words, "[w]hen, and only when, the plaintiff relies upon a *statute* as creating the duty does a doctrine known as the 'public duty rule' come into play." *Id.* at 103, 551 S.E.2d at 582 (emphasis added). In other words, when the plaintiff's negligence claim is founded upon a government entity's statutorily created duty, the question of "whether that duty will support the claim should be analyzed under the rule. On the other hand, where the duty relied upon is based upon the common law, . . . then the existence of that duty is analyzed as it would be were the defendant a private entity." *Id.* at 105, 551 S.E.2d at 583 (citations omitted).

Appellant in this case did not allege a violation of a statutory duty as the basis for his negligence claim. Rather, Appellant's allegations centered around violation of duties of care created by the common law, such as exercising reasonable caution. Generally, the public duty rule is invoked in cases where the duty is created by statute and would not otherwise exist. *See Arthurs* (alleging breach of duty created by criminal domestic violence statute, S.C. Code Ann. § 16-25-10 to -80 (Supp. 1994)); *Tanner v. Florence County Treasurer*, 336 S.C. 552, 521 S.E.2d 153 (1999) (alleging breach of duty created by statutory provision requiring notice to delinquent taxpayers, S.C. Code Ann. § 12-51-140 (Supp. 1998)). The duty to exercise reasonable care when operating a motor vehicle is not statutory; it is owed from all individuals to all other individuals. *See* S.C. Code Ann. § 56-5-760 (A) & (D) (Supp. 2002). Therefore, we find the public duty rule is not implicated in this case.

Although the trial judge did not address whether Respondent was immune from suit under the Tort Claims Act in his order, we note that it would not bar Appellant's suit. The Tort Claims Act abrogated South Carolina's sovereign immunity, making this state's governmental entities liable for their torts "in the same manner and to the same extent as . . . private individual[s] . . . , subject to the limitations upon liability and damages, contained herein." S.C. Code Ann. § 15-78-40. Section 15-78-60 contains specific exceptions to the waiver of

immunity, and the circumstances presented in this case are not included.[6] Appellant's action against Respondent does not fall within any of the listed exemptions. Therefore, Respondent is not immune from suit.

CONCLUSION

Based on the foregoing, we hold the Fireman's Rule is not recognized in South Carolina, and, therefore, that the trial court erred in finding it barred Respondent's suit. Accordingly, we **REVERSE** the grant of summary judgment for Respondent and **REMAND** for further proceedings in accord with this opinion.

MOORE, WALLER, BURNETT , JJ., and Acting Justice George T. Gregory, Jr., concur.

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[6]Appellant points out that section 15-78-60 (19) excludes activities of the South Carolina National Guard while engaged in training on duty, but limits that exemption to activities other than vehicular accidents. The National Guard does not have immunity from suit for vehicular accidents occurring during active training duty. If the General Assembly intended to create immunity for police officers for their vehicular accidents, it would have made an exemption from liability for them. The public policy concerns presented by the Amicus Curiae, therefore, may be best addressed by the General Assembly.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Appellant,

v.

Dante Ricardo Scott, Respondent.

Appeal From Lexington County
James Carlyle Williams, Jr., Circuit Court Judge

Opinion No. 25541
Heard June 13, 2002 - Filed October 21, 2002

REVERSED AND REMANDED

Deputy Director for Legal Services Teresa A. Knox, Legal Counsel Tommy Evans, Jr., and Legal Counsel J. Benjamin Aplin, all of South Carolina Department of Probation, Parole & Pardon Services, of Columbia, for appellant.

Assistant Appellate Defender Tara S. Taggart, of South Carolina Office of Appellate Defense, of Columbia, for respondent.

JUSTICE BURNETT: The State appeals the circuit court's Order requiring the Department of Probation, Parole and Pardon Services ("Department") to release Dante Ricardo Scott ("Scott") from its Community Supervision Program ("CSP"). We reverse and remand.

FACTS

Scott pled guilty to criminal conspiracy, common law robbery and kidnaping. He received a sentence of five years for criminal conspiracy. He was, additionally, sentenced concurrently to ten years for kidnaping and robbery, suspended upon confinement for three and one-half years and five years probation.

Scott served approximately 89.6% of the term of incarceration. Due to good conduct credits Scott "maxed out" his sentence, was released and placed in the CSP.

The State claims Scott violated the terms of his CSP nineteen times and failed to report for vocational rehabilitation.[1] The State sought to revoke his CSP.

At the revocation hearing, Scott argued he should be placed on probation, instead of CSP, because he "maxed out" his sentence. He further claimed he was not in violation of his probationary sentence because electronic monitoring was not a probationary condition. The circuit court judge agreed, terminated Scott's CSP and ordered the State to place him on probation. The State's motion for reconsideration was denied. The State appeals.

ISSUES

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[1] Along with participating in vocational rehabilitation, the community supervision conditions for Scott included intensive supervision and electronic monitoring not to exceed ninety (90) days.

I. Did the State properly and timely serve Scott with its notice of intent to appeal?

II. Did the circuit court err in terminating Scott's CSP and ordering him placed on probation?

I

Service of Notice of Intent to Appeal

Scott argues this Court lacks subject matter jurisdiction because the State failed to timely serve its notice of intent to appeal. See Rule 203, SCACR. We disagree.

Rule 203 requires the State serve a notice of appeal "within ten (10) days **after** receipt of written notice of entry of the order or judgment." Rule 203(b)(2), SCACR (emphasis added). The rule requires the State file the notice "with the clerk of the lower court and the clerk of the appellate court within ten (10) days **after notice of appeal is served**." Rule 203(d)(2), SCACR (emphasis added).

The State received the circuit court's order denying reconsideration on July 18, 2000, served its notice of intent to appeal on July 21, 2000, and filed the notice with the South Carolina Court of Appeals and, erroneously, with the Clerk of Court of Richland County on the same date.[2] The State correctly filed its notice of appeal with the Clerk of Court of Lexington County on July 31, 2000.

The State timely served a notice of appeal on Scott. See Rule 203(b)(2), SCACR. The notice of appeal was timely filed with the Clerk of Court of the Court of Appeals and a corrected notice of appeal with the Clerk

[2] This case, originally filed in the Court of Appeals, was transferred to this Court after submission of briefs but before oral arguments.

of Court of Lexington County within ten days after serving Scott. See Rule 203(d)(2), SCACR; see also Rule 234(a), SCACR ("In computing any period of time . . . the day of the act . . . after which the designated period of time begins to run is not to be included.").

Scott argues, however, the notice originally served on him incorrectly listed Richland County as the county from which the appeal was taken. As such, Scott believes the State failed to perfect service. We disagree.

While this Court has consistently held service of the notice of appeal is a jurisdictional requirement,[3] non-prejudicial clerical errors in the notice are not detrimental to the appeal. Moody v. Dickinson, 54 S.C. 526, 32 S.E. 563 (1899) (a court may allow an appellant to correct a mere clerical error in the notice of intention to appeal where there is no prejudice to the appellee); see also Charleston Lumber Co., Inc. v. Miller Housing Corp., 318 S.C. 471, 458 S.E.2d 431 (Ct. App. 1995).

It is undisputed Lexington County, rather than Richland County, was the proper county in which to file the notice. The State mistakenly filed in Richland County because Scott was supervised in Richland, the warrant was initiated in Richland, the hearing took place in Richland, and the circuit court mistakenly cited Richland County in its Order. The citation of the incorrect county in such circumstances is a clerical error. Scott does not allege, nor do we discern, he was prejudiced by the error, which was corrected within 10 days of notice to Scott. We are, therefore, not deprived of subject matter jurisdiction. See Charleston Lumber Co., Inc. v. Miller Housing Corp., supra.

II

Termination of Community Supervision

[3] Sadisco of Greenville, Inc. v. Greenville County Bd. of Zoning Appeals, 340 S.C. 57, 59, 530 S.E.2d 383, 383 (2000).

Scott contends the circuit court properly terminated his CSP because the Department may not require him to participate in the program after he has maxed out his sentence for the "no parole" offense. We disagree.

The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature. Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992). If a statute's language is plain, unambiguous, and conveys a clear meaning "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 81 (2000).

Because Scott maxed out[4] the non-suspended portion of his sentence, with the benefit of good conduct credits, two statutes are relevant to his situation. The first provides, in relevant part:

> Notwithstanding any other provision of law, except in a case in which the death penalty or a term of life imprisonment is imposed, **any** sentence for a "no parole offense" as defined in Section 24-13-100 **must include** any term of incarceration **and** completion of a community supervision program operated by the Department of Probation, Parole and Pardon Services.

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[4] Scott argues that upon his release from his active sentence, his accumulated good conduct credits applied and were sufficient to "buy out" the remaining portion of his active sentence. He argues he was, therefore, entitled to receive probation immediately upon release. We reject this argument. The Legislature unequivocally requires all persons convicted of a "no parole offense" to participate in community supervision. Scott's argument suggests the need to address the relationship, if any, between good conduct credits and the requirements of CSP. This issue is better addressed in the legislative forum but, in any event, is not properly before us for review.

S.C. Code Ann. § 24-21-560 (Supp. 2001) (emphasis added).

The second statute, concerning individuals who max out the active part of their sentence with the benefit of good conduct credits, provides, in relevant part:

> Any person who has served the term of imprisonment for which he has been sentenced less deductions allowed therefrom for good conduct is considered upon release to have served the entire term for which he was sentenced **unless** the person is required to complete a community supervision program pursuant to Section 24-21-560. If the person is required to complete a community supervision program, he must complete his sentence as provided in Section 24-21-560 prior to discharge from the criminal justice system.

S.C. Code Ann. § 24-13-210 (E).

Scott incorrectly asserts the section "simply sets out the legal framework for the CSP when it is made a part of an offender's 'no parole offense' sentence." The use of the words "must" along with the conjunction "and" indicate Scott's sentence for kidnaping requires a term of incarceration along with completion of a CSP. See Hodges v. Rainey, supra; Mitchell v. Holler, 311 S.C. 406, 410, 429 S.E.2d 793, 795 (1993) ("The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand a statute's operation.").

In the second statute, the word "unless" indicates a "no parole" offender has not completed his sentence, when using the benefit of good conduct credits, until completing the CSP. Scott was incarcerated for approximately 90% of the non-suspended portion of his sentence and was eligible for community supervision.[5] Scott took advantage of good conduct

[5] An individual convicted of a "no parole offense" must serve 85% of the "actual term of imprisonment imposed," less any part suspended, before

credits to max out his 3 ½ year sentence. See S.C. Code Ann. § 24-13-210 and § 24-13-220.

Contrary to Scott's argument, § 24-13-210 does not apply "only to offenders who had at a minimum served eighty-five percent of their sentences." Instead, the section applies to any "no parole" offender who statutorily maxes out his sentence with the benefit of good conduct credits.[6]

Under § 24-13-210, Scott has not served his entire active term of incarceration until he completes a CSP. The circuit court lacked the authority to terminate Scott's CSP. On remand, the circuit court shall determine whether Scott violated the conditions of his CSP and consider any violation in accordance with S.C. Code Ann. § 24-21-560(C) (Supp. 2001).

CONCLUSION

For the reasons articulated above we **REVERSE** and **REMAND**.

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becoming eligible for community supervision. See S.C. Code Ann. § 24-13-150(A)(Supp. 2001). "This percentage must be calculated without the application of earned work credits, education credits, or good conduct credits, and is to be applied to the actual term of imprisonment imposed, not including any portion of the sentence which is suspended." S.C. Code Ann. § 24-13-150(A) (Supp. 2002).

[6] An issue of concern is whether a "no parole" offense can include a probationary segment and how probation relates to CSP. A benefit of probation in such cases is it provides a vehicle to enforce a restitution order. See Barlet v. State, 288 S.C. 481, 343 S.E.2d 620 (1986) (defendant's probation may be revoked for wilfully failing to pay restitution). However, because the issue is not preserved for review we do not address whether trial courts may use probation for "no parole" offenses or whether they may instead require restitution as a condition of CSP. See State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989).

TOAL, C.J., MOORE and WALLER, JJ., concur.
PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Johnny Lee Lucas, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Dorchester County
Luke N. Brown, Trial Judge
Costa M. Pleicones, Post-Conviction Relief Judge

Opinion No. 25542
Submitted September 19, 2002 - Filed October 28, 2002

AFFIRMED

Johnny Lee Lucas, *pro se*, of Bennettsville, for Petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General B. Allen Bullard, and Assistant Attorney General W. Bryan Dukes, of Columbia, for Respondent.

JUSTICE WALLER: We granted Petitioner a belated review of his direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 60 (1975). We affirm.

FACTS

Petitioner, Johnny Lee Lucas (Lucas), was convicted of first degree burglary, grand larceny, pointing and presenting a firearm, and possession of a firearm by a convicted felon, in connection with the April 15, 1996, burglary of a North Charleston home.[1] He was sentenced to life without parole for burglary under the recidivist statute, and given five years on each of the remaining charges.

During Lucas' trial, his attorney, William Thrower, moved to be relieved as council on the basis that his client intended to call a witness, Rose Marie Brown, who planned to give perjured testimony. The trial judge decided to take Brown's testimony *in camera*. The gist of her testimony was that Lucas had left Brown's house with her husband, Robert Brown, at approximately 9:30a.m. on April 15, 1996, to go see the burglary victim, Mr. Lindenburg; Mrs. Brown believed Lindenburg owed her husband some money. During the *in camera* hearing, it was revealed that Brown's testimony had been written out for her. The statement was in handwritten form, and was not Mrs. Brown's handwriting. She had been given the statement by Lucas' attorney, Mr. Thrower. Thrower advised the court that he had met with Lucas on Sunday evening and that Lucas had given him the statement to help Brown refresh her memory. However, after talking with Brown in the hallway on the day of trial, it had come to Thrower's attention that her testimony was not going to be truthful. He based this assertion on the fact that when he questioned her as to whether the written statement was the sworn truth, she would only reply that it was what she was going to testify to, and when again asked if everything in the statement were truthful, she would not say so. The trial court denied counsel's motion to be relieved.

[1] The owners of the home, Mr. and Mrs. Lindenburg came home from a walk and found the burglary in progress. Mr. Lindenburg had a gun with him and shot and killed Lucas' cohort, Robert Anthony Lee Brown, and shot Lucas in the chest.

At the close of evidence, Lucas moved for a mistrial on the ground that, *inter alia*, "the lawyer said he didn't want to handle this case, so I had ineffective assistance." The trial court denied the motion, ruling that counsel was still there as Lucas' lawyer, notwithstanding Lucas was not obliged to use him if he didn't want. Closing arguments were then made by both Thrower and Lucas. Lucas renewed his motion for a mistrial based upon counsel's "backing out on him."

Lucas filed for PCR alleging ineffective assistance of counsel in failing to perfect an appeal, and alleging a denial of due process. The PCR court ruled Lucas was entitled to a belated appeal of his direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Thereafter, this Court affirmed three of Lucas' direct appeal issues pursuant to Rule 220(b),SCACR. However, we granted certiorari to review the direct appeal issue concerning denial of counsel's motion to be relieved and denial of Lucas' motion for a mistrial.

ISSUE

> Where an attorney forms a good faith basis for suspecting his client is about to present perjured testimony, and thereafter reveals the suspected perjury to the trial court and moves to be relieved as counsel, does the trial court's denial of the motion to be relieved constitute an abuse of discretion, depriving the defendant of a fair trial?

DISCUSSION

Pursuant to Rule 407, SCACR, Rules of Professional Conduct (RPC), Rule 3.3:

> (a) A lawyer shall not knowingly. . .
>
> (4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

> (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
>
> (c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

Rule 1.6(b) of the RPC permits an attorney to reveal client confidences "to the extent the lawyer reasonably believes necessary. . . [t]o prevent the client from committing a criminal act. . . ." The notes following Rule 1.6 recognize an exception to the general prohibition against disclosure in that a lawyer may not counsel or assist a client in conduct that is criminal or fraudulent, see Rule 1.2(d), and has a duty under Rule 3.3(a)(4) not to use false evidence. If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1)(lawyer must withdraw from representation if representation will result in violation of the Rules of Professional Conduct or other law).

In Nix v. Whiteside, 475 U.S. 157 (1986), the United States Supreme Court ruled that a criminal defendant's sixth amendment right to effective assistance of counsel was not violated when the attorney refused to cooperate with the defendant in presenting perjured testimony at trial. In Nix, the defendant, Whiteside, who was charged with murder, had consistently advised his attorney that although he had not seen a gun in the victim's hand, he was convinced the victim in fact possessed a gun. Shortly before trial, however, Whiteside told counsel he had seen "something metallic" in the victim's hand. When asked about his change in stories, he told counsel "If I don't say I saw a gun, I'm dead." Counsel advised Whiteside that if he insisted upon testifying falsely, counsel would be compelled to advise the court of his belief that Whiteside was committing perjury, and would also move to withdraw as his counsel. Whiteside ultimately testified in accordance with his original version of events, admitting on cross examination that he had not seen a gun in the victim's hand. After he was convicted of murder, Whiteside sought a new trial, claiming he had been deprived of a fair trial by counsel's admonitions not to testify as to seeing something metallic in the victim's hand. The Iowa Supreme Court affirmed the denial of the

new trial motion, ruling counsel's actions were not only permissible, but were required under Iowa law.

Thereafter, Whiteside sought federal habeas corpus relief, alleging he had been denied effective assistance of counsel and of his right to present a defense by counsel's refusal to allow him to testify as proposed. The Court of Appeals for the Eighth Circuit agreed, reasoning that an intent to commit perjury, communicated to counsel, does not alter a defendant's right to effective assistance of counsel and that counsel's admonition that he would advise the court of Whiteside's perjury constituted a threat to violate his duty to preserve client confidences. The Eighth Circuit concluded that the prejudice prong of Strickland v. Washington[2] was satisfied by an implication of prejudice from the conflict between counsel's duty of loyalty to Whiteside and his ethical duties. Whiteside v. Scurr, 744 F.2d 1323 (8th Cir. 1984).

The United States Supreme Court reversed in Nix, stating, "Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law." 477 U.S. at 166. The Court went on to note that under the Iowa Code of Professional Responsibility, the rules "do not merely authorize disclosure by counsel of client perjury, they require such disclosure. . .," id. at 168, and that the rules "expressly permit withdrawal from representation as an appropriate response of an attorney when the client threatens to commit perjury." Id. at 170. The Court concluded that counsel's representation fell well within accepted standards of professional conduct, and did not pose the type of "conflict" which would obviate the need for a showing of prejudice under Strickland v. Washington.[3]

We find attorney Thrower's actions in the present case consistent with the South Carolina Rules of Professional Conduct. As noted previously, Thrower was prohibited by Rule 3.3. from offering evidence he reasonably believed was

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[2] Strickland v . Washington, 466 U.S. 668 (1984).

[3] The Court stated, "Here, there was indeed a "conflict," but of quite a different kind; it was one imposed on the attorney by the client's proposal to commit the crime of fabricating testimony. . . This is not remotely the kind of conflict of interests dealt with in Cuyler v. Sullivan (allowing a defendant to obtain relief without a showing of prejudice due to counsel's representation of conflicting interests). Id. at 175.

false,[4] was authorized by Rule 1.6(b) to reveal confidences necessary to prevent a criminal act, and was permitted to withdraw pursuant to Rule 1.16(a). We find no ethical violation. Moreover, we find no prejudice to Lucas as a result of the trial court's denial of counsel's motion to be relieved.

In Matter of Goodwin, 279 S.C. 274, 305 S.E.2d 578 (1983), this Court addressed the appropriate action of a trial judge when faced with the situation of an attorney attempting to withdraw due to suspected client perjury. We stated,

> While an attorney has an ethical duty not to perpetrate a fraud upon the court by knowingly presenting perjured testimony, the defendant has a constitutional right to representation by counsel. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Had the trial judge allowed the withdrawal, any new attorney he appointed would, if faced with the same conflict, have moved to withdraw, potentially resulting in a perpetual cycle of eleventh-hour motions to withdraw. Worse, new counsel might fail to recognize the problem and unwittingly present false evidence.[5]
>
> . . . [M]otions to withdraw must lie within the sound discretion of the trial judge. In making the decision, the trial court must balance the need for the orderly administration of justice with the fact that an irreconcilable conflict exists between counsel and the accused. The court should consider the timing of the motion, the inconvenience to the witnesses, the period of time elapsed between the date of the alleged offense and the trial, and the possibility that any new counsel will be confronted with the same conflict.

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[4] Lucas asserts Thrower did not "reasonably believe" Brown's testimony would be perjured because he could not say, for certain, that the testimony was in fact false. On the present record, we find Thrower's belief that Brown would commit perjury were entirely reasonable, which is all that is required under the Rules of Professional Conduct.

[5] Although language in Goodwin indicated counsel was prohibited from disclosing the suspected perjury, it was written in 1983, prior to adoption of the Rules of Professional Conduct, which became effective in September 1990, and which specifically permit disclosure of client confidences if necessary to prevent a criminal act.

279 S.C. at 276-77, 305 S.E.2d at 579 (emphasis supplied). Here, it is patent that any new attorney would have been confronted with the same dilemma. Moreover, the motion to be relieved came nearly half way through a very serious trial. We find no abuse of discretion in the trial court's denial of the motions to be relieved and for a mistrial.

Finally, we find Lucas has demonstrated no prejudice from denial of counsel's motion to be relieved. Although Lucas himself decided to cross-examine his witnesses, he did so of his own volition, with counsel at his side at all times ready to assist in his defense.[6] Further, counsel made all appropriate motions at the close of both the state's case and the close of evidence, and gave a closing statement to the jury. Accordingly, Lucas has failed to demonstrate in what manner his defense was prejudiced by denial of counsel's motion to be relieved. Lucas' convictions and sentences are

AFFIRMED.

TOAL, C.J., MOORE and BURNETT, JJ., concur. PLEICONES, J., not participating.

[6] In fact, at the outset of trial, by his own request, Lucas was appointed co-counsel to assist in his defense. Further, in response to Lucas' motion for a mistrial, the court noted, "I denied his motion [to be relieved], and he still sits there as your lawyer. You don't have to use him if you don't want to, but he's still available."

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Rebecca Martin, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Lexington County
Marc H. Westbrook, Circuit Court Judge

Opinion No. 25543
Heard September 17, 2002 - Filed October 28, 2002

REVERSED AND VACATED

Robert E. Newton, of Breibart, McCauley & Newton, P.A., of Lexington, for Petitioner.

Senior Assistant General Counsel, South Carolina Department of Public Safety, Frank L. Valenta, Jr., and General Counsel and Deputy Director for Policy, Eugene H. Matthews, of Columbia, for Respondent.

JUSTICE WALLER: We granted a writ of certiorari to review the Court of Appeals' opinion in State v. Martin, 341 S.C. 480, 534 S.E.2d 292 (Ct. App. 2000). We reverse.

Through a series of administrative errors, Martin was notified in December 1997, that she had been "convicted," *in absentia,* of driving under the influence (DUI) first on August 26, 1997. A bench warrant was issued for her arrest, she was fined $425.00, and her license was suspended for nearly six months. Nearly six months later, in June 1998, the state sought and obtained an Ishmell[1] order reopening the case on the ground that the traffic ticket had been "signed off" in error.[2] The circuit court ruled that the state's efforts to set aside the ticket were both untimely and improperly handled.[3] Accordingly, the Ishmell order was vacated and the DUI first ticket was reinstated.

The Court of Appeals affirmed the decision to vacate Ishmell order, but vacated the portion of the circuit court's order which required reinstatement of Martin's DUI "conviction." We reverse the Court of Appeals' ruling and reinstate the circuit court's order.

The state took no action between December 1997 and June 1998 to rectify the situation or to notify Martin that her "conviction" had been erroneously entered. Rather, it issued a bench warrant for her arrest, suspended her driver's license, allowed her to pay a $425.00 fine, and required her to enroll in ADSAP classes and purchase SR-22 insurance in order to obtain a provisional driver's license. Its failure to take any remedial action to remedy this situation in a timely manner therefore precluded its ability to challenge the entry of a conviction on the DUI first ticket. See Rule 29, SCRCrimP(in cases involving

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[1] Ishmell v. South Carolina Highway Dep't, 264 S.C. 340, 215 S.E.2d 201 (1975) (ruling that the time limit for making a new trial motion begins to run when the defendant receives actual notice of the conviction and remanding the case to determine the timeliness of the motion and its merits after both parties receive notice).

[2] The state's purpose in moving to set aside the DUI first "conviction" was to enable it to charge Martin with felony DUI.

[3] It is undisputed that Martin's attorney notified the state of the August 1997 dispostion of the ticket shortly after Martin received notice thereof in December 1997.

appeals from convictions in magistrate's court, post trial motions must be made within ten (10) days after receipt of written notice of entry of the order or judgment disposing of the appeal). The state does not dispute that its motion to set aside the original conviction was untimely. As we noted in Brewer v. South Carolina State Highway Dep't, 261 S.C. 52, 56, 198 S.E.2d 256, 257 (1973), "a party's time to appeal from a judgment in a magistrate's court or move for a new trial therein . . . begin[s] [when] he has notice of the judgment." Accordingly, as the state concedes it had actual notice of the entry of Martin's "conviction" in December 1997, and failed to timely appeal or take any other action to correct the matter, it was procedurally barred from contesting the validity of that "conviction."[4] The Court of Appeals erred in concluding otherwise.

VACATED AND REVERSED.

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

[4] In light of our ruling, we need not address whether the erroneous entry of judgment in fact constituted a valid "conviction."

THE STATE OF SOUTH CAROLINA
In The Supreme Court

R.L. Jordan Oil Company of North Carolina, Inc., Plaintiff,

v.

Boardman Petroleum, Inc., Defendant.

ON CERTIFICATION FROM THE
UNITED STATES DISTRICT COURT

Opinion No. 25544
Heard September 17, 2002 - Filed October 28, 2002

CERTIFIED QUESTION ANSWERED

Matthew A. Henderson and Joshua M. Henderson, of Henderson, Brandt & Vieth, P.A., of Spartanburg, for plaintiff.

William M. Grant, Jr., of Grant, Leatherwood & Pitts, P.A., of Greenville; and R. Perry Sentell, III, of Kilpatrick Stockton L.L.P., of Augusta, Georgia, for defendant.

JUSTICE MOORE: We accepted this case on certification from the federal district court to determine the meaning of the term "meet competition" in S.C. Code Ann. § 39-5-325(A) (Supp. 2002), which provides:

> (A) Except as otherwise permitted to meet competition as provided by this chapter, it is declared an unfair trade practice and unlawful for any person who is in the retail business of selling motor fuel to sell motor fuel of like grade and quality at retail at a price which is below the cost of acquiring the product plus taxes and transportation where the intent or effect is to destroy or substantially lessen competition or to injure a competitor.

(emphasis added). We find the term "meet competition" as used in this section means to meet the existing price of a competitor.

FACTS[1]

During the pertinent time period, both plaintiff (Jordan) and defendant (Boardman) operated convenience stores in South Carolina. Jordan operated "Hot Spot" and Boardman operated "Smile Gas." Jordan had two Hot Spot stores in Spartanburg County along I-26 located within several miles of two of Boardman's Smile Gas stores.

In July 1998, Jordan began selling Shell brand gasoline at its Hot Spot stores. Shortly after the Shell logo and colors went up at Jordan's stores, Boardman, who did not sell national brand name gasoline, lowered the price of its regular unleaded gasoline, setting it at two cents below the price of the Shell brand gasoline. Jordan responded with its own price reduction, matching Boardman's prices. Boardman lowered its prices again, reestablishing a two-cent per gallon price differential. This cycle of price

[1] These facts are taken from the Fourth Circuit Court of Appeals' slip opinion in this case.

adjustments continued downward until both parties were selling below cost. The parties continued to sell below cost until early October 1998.[2]

Jordan then commenced this action alleging a violation of the South Carolina Unfair Trade Practices Act (SCUTPA) under § 39-5-325(A). The district court entered judgment for Boardman finding this section did not apply to independent gasoline retailers and that selling below cost was allowed to "meet competition."[3] On appeal, the Fourth Circuit reversed and remanded with directions that the district court certify to this Court the question whether selling below cost was permissible under the "meet competition" exception. The question now certified by the district court is:

> Does an independent retailer "meet competition" by selling below cost at a price that is two cents below the price of the national brand competitor under S.C. Code Ann. § 39-5-325(A) of the South Carolina Unfair Trade Practices Act?

DISCUSSION

Essentially, the novel issue here is whether the term "meet competition" means a gasoline retailer may sell below cost only to match the price of a competitor and not lower. Here, Boardman sold below cost at two cents less than the price charged by Jordan.[4] Boardman defends this practice on the ground retailers of nationally branded gasoline have a market advantage over independent retailers based on name recognition and

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[2] According to Boardman's brief, Jordan actually reached below-cost levels first because Jordan pays more for the same grade of gasoline.

[3] In deciding the case, the district court certified a question to this Court regarding the appropriate standard for reviewing challenges to state statutes on substantive due process grounds. R.L. Jordan Co. v. Boardman Petroleum, Inc., 338 S.C. 475, 527 S.E.2d 763 (2000). Whether the statute passes constitutional muster remains unanswered by the district court and we express no opinion on the merits of that question.

[4] Apparently Jordan sold below-cost only to meet the prices charged by Boardman.

"customer perceptions" instilled by advertising. Boardman contends an independent retailer should be allowed under § 39-5-325(A) to sell at lower prices in order to "meet competition" from national brand gasoline retailers. We disagree.

The relevant statutory scheme indicates "meet competition" means to match the price charged by the competition without considering other competitive factors. Section 39-5-325(A) specifically states it is unlawful to sell gasoline below cost "[e]xcept as otherwise permitted to meet competition as provided by this chapter." The only other provision in this chapter relating to the exemption for meeting competition is S.C. Code Ann. § 39-5-350 (Supp. 2002) which provides:

> (A) . . . .Retail sales of merchandise of like grade and quality at a price to meet existing competition at any time in any town or locality are also exempt from the provisions of this article. But if such competition is created by any person in violation of this article or when any two or more persons contend that they are meeting the competition of the other and all would be making retail sales in violation of this article, except for the above provisions allowing existing competition to be met, any retailer affected thereby may enjoin all in such category from continuing such practices in any court of competent jurisdiction in this State.
>
> (B)Any person selling motor fuel at wholesale or retail at a price below the actual cost of acquiring the product, including transportation and taxes, claiming exemption from this article on the basis that such sales of motor fuel by that person are at a price to meet existing competition under subsection (A) of this section shall keep and maintain records substantiating each effort to meet the competition, including the identity and place of business of the

> competitors whose competition that person is meeting. . . .

The repeated reference to meeting "existing competition" indicates the legislature intended an exemption for below-cost sales only to match the existing price of a competitor. *See* Wade v. Berkeley County, 348 S.C. 224, 559 S.E.2d 586 (2002) (cardinal rule of statutory construction is to ascertain and effectuate intent of the legislature). To construe "existing competition" to refer generally to any competitive factors, rather than a competitor's existing price, would nullify the prohibition on selling below cost. A retailer could assert any number of factors that affect competition *i.e.*, location, hours of operation, appearance, overhead, customer base, etc., to claim an exemption for meeting competition.

Further, the specific directive in § 39-5-350(B) that a retailer selling below cost keep records "substantiating each effort to meet the competition" indicates a fluctuating factor such as price rather than a more permanent competitive factor.

Finally, as Boardman acknowledges in its brief, independent retailers generally pay less for gasoline and can therefore sell at a lower price than national brands without going below cost. Independent retailers therefore do have some competitive advantage over the national brands and are not presumptively disadvantaged. There is no support for the argument the legislature intended to protect independent gasoline retailers over retailers selling national brands.

In conclusion, we construe the term "meet competition" in § 39-5-325(A) to mean "to meet the existing price charged by a competitor." A gasoline retailer who sells below cost at a price less than that of the competition does not qualify for the exemption provided in this section. Accordingly, we answer the certified question in the negative.

CERTIFIED QUESTION ANSWERED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The Housing Authority of the
City of Charleston, Petitioner,

v.

Willie A. Key, Respondent.

ORIGINAL JURISDICTION

Opinion No. 25545
Submitted September 17, 2002 - Filed October 28, 2002

INJUNCTION ISSUED

Donald B. Clark, of Rosen, Rosen & Hagood, L.L.C., of Charleston, for petitioner.

Willie A. Key, of Charleston, *pro se*.

JUSTICE MOORE: We accepted this case in our original jurisdiction to determine whether respondent has engaged in the unauthorized practice of law. We find he has and enjoin him from further engaging in such conduct.

FACTS

Petitioner (Housing Authority) commenced this action seeking to enjoin respondent Key from the unauthorized practice of law. We appointed the Honorable John W. Kittredge as special referee to hear evidence and make recommendations. Based on the uncontested facts set forth below, Judge Kittredge concluded respondent had engaged in the unauthorized practice of law and recommended an injunction be issued. No objections to the referee's report have been filed.

Respondent has a paralegal certificate and worked as a paralegal at a law firm in Charleston for three years. He has been unemployed since 2000 and has no address or telephone number. Respondent volunteers at an office referred to as "the Fair Housing Office" in Charleston advising people who call with landlord complaints. He is not paid. No attorney supervises the office.

In 2001, on behalf of Jacqueline Sarvis and Derotha Robinson, respondent prepared and filed a complaint in federal court alleging unlawful evictions.[1] He appeared at a status conference before the federal magistrate. Respondent also prepared pleadings filed in circuit court alleging an unlawful termination of public assistance rental benefits for Joan Whitley and assisted Ms. Whitley at the hearing in circuit court.[2] Respondent did not sign any of the pleadings he prepared but had them signed by the plaintiffs as *pro se* litigants. He accepted no payment and in fact paid the filing fees out of his own pocket. Respondent did not obtain leave of court to represent any of these clients.[3]

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[1] This action was ultimately dismissed as frivolous except for one cause of action; the appeal was dismissed for failure to prosecute.

[2] This action was dismissed for lack of subject matter jurisdiction.

[3] Under former S.C. Code Ann. § 40-5-80 (1986), a citizen could represent another with leave of the court. This section was recently amended

DISCUSSION

Respondent defends his conduct on the ground he was not paid and he had the clients' permission to represent them.[4]

The practice of law includes the preparation of pleadings and the management of court proceedings on the behalf of clients. Doe v. Condon, ___ S.C. ___, 568 S.E.2d 356 (2002). Respondent's activities on behalf of Whitley, Robinson, and Sarvis constituted the practice of law. The fact that respondent accepted no remuneration for his services is irrelevant. Our purpose in regulating the practice of law is to protect the public from the negative consequences of erroneously prepared legal documents or inaccurate legal advice given by persons untrained in the law. Linder v. Ins. Claims Consultants, Inc., 348 S.C. 477, 560 S.E.2d 612 (2002). We note respondent has shown no indication he intends to discontinue his practice of representing others in court.

We hereby adopt the referee's findings and enjoin respondent from further engaging in the unauthorized practice of law.

INJUNCTION ISSUED.

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

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to omit a citizen's right to defend or prosecute the cause of another effective June 5, 2002.

[4] Respondent filed no objections to the referee's report but stated this position when he was deposed.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Jerry W. Craig, Respondent.

Opinion No. 25546
Submitted September 20, 2002 - Filed October 28, 2002

PUBLIC REPRIMAND

Henry B. Richardson, Jr., and Assistant Deputy Attorney General J. Emory Smith, Jr., both of Columbia, for the Office of Disciplinary Counsel.

Coming B. Gibbs, Jr., of Charleston, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to imposition of a sanction ranging from an admonition to a public reprimand. Respondent has also agreed to resign from membership in the South Carolina Bar.[1] We accept the agreement and issue a public reprimand. The facts as admitted in the agreement are as follows.

[1] This is the second occasion in which the Court has sanctioned respondent. In 1995, respondent was suspended from the practice of law for 15 months for negligent management of his trust account, failure to supervise employees, lack of diligence, failure to avoid the appearance of

Facts

I. Real Estate Matters

In the first matter, respondent prepared a deed for a client in 1986. Respondent failed to include an acre of land in the deed. In 1996, the client informed respondent of this error. Because respondent failed to correct this error in a timely fashion, the client hired another attorney to correct the error.

In the second matter, respondent represented the purchasers in a real estate transaction in 1985. The property was subject to a $2,000 lien. In 1999, the purchasers learned that the lien had not been satisfied and notified respondent. Respondent failed to respond to the purchasers' requests for assistance, and the purchasers personally satisfied the lien. Subsequently, respondent reimbursed the purchasers for their costs in satisfying the lien and otherwise settled the matter to their satisfaction.

II. Domestic Matter

In a third matter, respondent undertook representation of a client in a domestic matter. Respondent made inappropriate remarks to the client, used vulgar language, told jokes with sexual references, and offered to reduce his fee if the client would allow respondent to watch the client engage in a specified act. At some point, respondent informed the client that a hearing had been scheduled in her case for February 1999 when, in fact, no hearing was scheduled. Respondent also failed to return the client's telephone calls and failed to respond to the client's letter, dated January 19, 1999, requesting the return of the fees paid by the client to respondent.

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impropriety, and failure to cooperate with the disciplinary investigation. In re Craig, 317 S.C. 295, 454 S.E.2d 314 (1995).

III. Failure to Respond to the ODC

In all of these matters, respondent failed to respond to ODC's initial inquiries and did not respond in a timely fashion to ODC's letters pursuant to In re Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982).

IV. Employer Withholding Tax Matter

Liens for payment of employer withholding taxes have been filed against respondent by the South Carolina Department of Revenue and the United States Internal Revenue Service. Respondent has satisfied the lien filed by the South Carolina Department of Revenue, but the federal lien has not been satisfied.

Law

As a result of his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (failing to provide competent representation); Rule 1.3 (failing to act with reasonable diligence and promptness in representing a client); Rule 1.4(a) (failing to promptly comply with reasonable requests for information); Rule 8.4(a) (violating the Rules of Professional Conduct); Rule 8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness); Rule 8.4(d) (engaging in conduct involving misrepresentation); and Rule 8.4(e) (engaging in conduct prejudicial to the administration of justice).

Respondent has also violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating the Rules of Professional Responsibility); Rule 7(a)(3) (knowingly failing to respond to a lawful demand from a disciplinary authority); Rule 7(a)(4) (committing a serious crime); Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice); and Rule 7(a)(6) (violating the Oath of Office taken upon admission to the practice of law).

Conclusion

Respondent has fully acknowledged that his actions in the aforementioned matters were in violation of the Rules of Professional Conduct and the Rules for Lawyer Disciplinary Enforcement. In light of respondent's resignation from the South Carolina Bar, we accept this agreement and publicly reprimand respondent.

PUBLIC REPRIMAND.

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

The Supreme Court of South Carolina

In the Matter of Gene C. Wilkes, Jr., Respondent.

ORDER

By order dated June 27, 2002, respondent was placed on interim suspension and Stephan Charles Ouverson was appointed to represent the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR. In the Matter of Wilkes, 350 S.C. 286, 566 S.E.2d 521 (2002).

By order dated August 21, 2002, respondent was directed to appear before this Court on September 18, 2002, to show cause why he should not be held in civil or criminal contempt for failing to produce bank records and client files sought by the Office of Disciplinary Counsel and Mr. Ouverson. Assistant Disciplinary Counsel Barbara M. Seymour, Mr. Ouverson, Doug F. Pollack, and respondent appeared at the hearing and provided sworn testimony regarding this matter. The following facts were gleaned from the testimony at the hearing as well as affidavits attached to the

Petition for a Finding of Contempt filed by the Office of Disciplinary Counsel.

On March 15, 2002, in connection with its investigation into matters which resulted in respondent's interim suspension, the Office of Disciplinary Counsel issued a subpoena directing respondent to deliver certain client files and financial records to the Office of Disciplinary Counsel no later than 5:00 p.m. on April 5, 2002. Respondent did not comply with the subpoena.

On May 7, 2002, respondent appeared in the Office of Disciplinary Counsel to give a statement on the record pursuant to Rule 19(c)(4), RLDE. At that time, respondent provided some of the subpoenaed client files but failed to produce any financial records. At his appearance, respondent agreed to fully comply with the subpoena, and to provide additional documentation that he referenced in his statement on the record, within ten days. Mrs. Seymour, by letter dated May 7, 2002, confirmed her conversation with respondent and respondent's agreement to produce documents identified in the letter.

On May 16, 2002, respondent sought an extension of time to comply, stating he had been "unable to process all of the documentation." Disciplinary Counsel granted respondent's request and extended his time to comply to May 22, 2002. However, respondent failed to produce the documentation.

On May 22, 2002, respondent called Mrs. Seymour and informed her that his bank records had been damaged by water in a storage facility and that he was unable to produce them at that time. Respondent was instructed by Mrs. Seymour to immediately produce the other documents listed in her letter of May 7, 2002, and to produce the bank records as soon as possible.

On May 24, 2002, respondent provided the client files as requested, but failed to produce any financial documentation from those files. On June 12, 2002, Mrs. Seymour sent another letter to respondent informing him that certain financial records from the client files had not been received and that he had not produced other documentation as agreed. Respondent was given until June 24, 2002, to comply with all outstanding demands for the production of documents.

On May 26, 2002, respondent again appeared in the Office of Disciplinary Counsel and signed a Consent to Interim Suspension. He did not produce any records at that time. He was personally served with a demand subpoena for his financial records, office computers, and the items he had previously agreed to produce without subpoena. Respondent has not complied with the subpoena.

On June 28, 2002, Mr. Ouverson, pursuant to this Court's order appointing him to protect the interests of respondent's clients, spoke with respondent by telephone. Respondent informed Mr. Ouverson that his client files and bank records were located in his office or in a mini-warehouse. When Mr. Ouverson gained access to respondent's office that same day he found no current files or bank records, other than bank statements from March, April and May 2002, and no computers. Mr. Ouverson described respondent's office as being in disarray with empty file cabinet drawers standing open and evidence that moving boxes had been used to pack up the files. Mr. Ouverson went to the mini-warehouse and found boxes of files stacked from floor to ceiling, but no files more recent than 1997.

Also on June 28, 2002, Doug F. Pollack, an investigator for Attorney's Title Insurance Fund who had accompanied Mr. Ouverson to respondent's office, met with respondent. Respondent informed Mr. Pollack that on June 20, 2002, he had placed all of his client files, bank records and computers in an open trailer for the purpose of moving them to his storage facility. Respondent further stated that because he was unable to access the facility he left the trailer outside the facility over the weekend. Respondent represented that a rainstorm destroyed all of the documents and computers in the trailer. Respondent further stated that he had discarded the contents of the trailer in several trash dumpsters in the area.

On July 1, 2002, Mr. Ouverson again spoke with respondent over the telephone. Respondent relayed a story similar to the one he had given Mr. Pollack, except he told Mr. Ouverson he removed the files and records from his office on June 20, 2002, he stated he left the trailer outside overnight, rather than over the weekend, and he did not indicate the computers were on the trailer. Respondent also informed Mr. Ouverson that he did not intend to pay the bank to reconstruct his financial records because

"the Supreme Court" would subpoena and pay for them and would be required to provide him with a copy.

On July 5, 2002, the Office of Disciplinary Counsel moved before an Investigative Panel of the Commission on Lawyer Conduct for an order pursuant to Rule 31(b)(1), RLDE, compelling respondent's cooperation with Mr. Ouverson. On July 12, 2002, respondent was personally served with an order of the Vice Chairman of the Commission on Lawyer Conduct instructing him to immediately cooperate with Mr. Ouverson and to produce all client files and bank records to him.

On July 16, 2002, Mr. Ouverson sent a written request to respondent asking him to make all of his client files and bank records available to him within twenty-four hours. On July 18, 2002, Mr. Ouverson wrote to the Office of Disciplinary Counsel and reported that respondent had contacted him and again informed him that he did not have the client files.

On July 29, 2002, the Office of Disciplinary Counsel filed a petition with this Court asking it to 1) inquire into the matters set forth herein; 2) issue an order requiring respondent to show cause why he should not be held in contempt of this Court and why he should not be incarcerated

or given such other sanction as the Court deems appropriate; 3) issue an order compelling respondent to immediately request from, and pay his bank(s) for, copies of any and all bank records related to his law practice, and to produce those documents both to the Office of Disciplinary Counsel and to Mr. Ouverson immediately upon receipt; and 4) issue an order compelling respondent to immediately produce any and all client files, or the remains thereof, to Mr. Ouverson or, in the alternative, to inform Mr. Ouverson of the location of the secreted files and provide him access thereto.

By way of his return to the Petition for a Finding of Contempt and his testimony at the Rule to Show Cause hearing, respondent maintained that following a break-in at the mini-warehouse the door to his storage unit was not secured and water came under the door and ruined several boxes of financial records on the floor immediately inside the door. He also explained that he was moving files from his office because he had paid the rent through the month of June but was unable to pay rent for the month of July. He stated that on the evening of June 21, 2002, he finished loading the files and computers from his office and drove them to the storage facility; however, because it was too dark to unload the trailer, he unhooked it, covered it with a

tarp and went home, intending to return the following morning and rearrange the storage unit and unload the contents of the trailer. Respondent maintains that due to continuous rains he was unable to unload the trailer the following day. When he returned two days later, the trailer was uncovered and the files were completely soaked. Instead of allowing the files to dry and assessing the damage thereafter, respondent took the files, which he described as being like "tissue paper" and disposed of them in various dumpsters. Although respondent stated in his return that he discussed with Mr. Ouverson the fact that the destruction of the files would cause him and his former clients "difficulties for years to come," respondent candidly admitted at the Rule to Show Cause hearing that at the time he destroyed the files he did not even think about the fact that the files were under subpoena or that the files belonged to clients and contained important real estate documents. Respondent denies stating he did not intend to pay for the reconstruction of his financial records or that this Court would have to pay for the records, but instead maintains he informed Mr. Ouverson that he was unable to pay the costs of reconstructing the records. Finally, with regard to the discrepancies between the stories he told Mr. Ouverson and Mr. Pollack, respondent

maintains any discrepancy in the date he removed the files was simply an error on his part, his reference to "overnight" was intended to refer to the time period set forth above, and his failure to disclose that the computers were on the trailer was because the computers were not being discussed.

The power to punish for contempt is inherent in all courts and is essential to the preservation of order in judicial proceedings. In re Brown, 333 S.C. 414, 511 S.E.2d 351 (1998) (citations omitted). The primary purposes of criminal contempt are to preserve the court's authority and to punish for disobedience of its orders. Poston v. Poston, 331 S.C. 106, 502 S.E.2d 86 (1998). Wilful disobedience of a subpoena issued by the Office of Disciplinary Counsel may result in contempt. In re Diggs, 344 S.C. 434, 544 S.E.2d 632 (2001). A wilful act is defined as one "done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done, that is to say, with bad purpose either to disobey or disregard the law." In re Brown, supra at 420-421, 511 S.E.2d at 355 (quoting Spartanburg County Dep't of Social Servs. v. Padgett, 296 S.C. 79, 370 S.E.2d 872 (1988)).

We find respondent in criminal contempt for wilfully failing to comply with the subpoenas issued by the Office of Disciplinary Counsel as well as the order issued by the Vice Chairman of the Commission on Lawyer Conduct and for willfully destroying records under subpoena. We find respondent repeatedly lied to the Office of Disciplinary Counsel when he told them he would produce the requested documents and then destroyed those documents with full knowledge that they were under subpoena. Moreover, we find respondent's general explanation for what he did and his assertion of lack of intent not credible. In sum, we find respondent's contumacious disregard for the authority of the Office of Disciplinary Counsel and its subpoenas, his failure to cooperate with the attorney appointed to protect the interests of his clients, and his complete lack of remorse for destroying client documents reprehensible.

We therefore sentence respondent to six months in jail. The Horry County Sheriff's Department is hereby directed to apprehend respondent immediately and remand him to the custody of the J. Reuben Long Detention Center in accordance with this order.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

September 19, 2002

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Richard E. Lee, Respondent/Appellant,

v.

Thermal Engineering
Corporation and Willie Best, Appellants/Respondents.

Appeal From Richland County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 3556
Heard June 5, 2002 – Filed October 28, 2002

AFFIRMED IN PART AND REVERSED IN PART

W. Duvall Spruill, of Columbia; for Appellant-Respondent(s)

Edwin Russell Jeter, of Columbia; Richard J. Morgan, of Columbia; for Respondent-Appellant(s)

CURETON, J.: Richard E. Lee sued Thermal Engineering Corp. and its founder, Willie Best (collectively, "Thermal"), asserting claims for breach of contract and violation of the Payment of Post-Termination Claims to Sales Representatives Act, S. C. Code Ann. § 39-65-10 to –80 (Supp. 2001). Lee also sought punitive damages and attorney fees. Following a bench trial, the court granted judgment to Lee. In a separate order, the court awarded Lee attorney fees and prejudgment interest, but denied Lee's request for punitive damages. Both Thermal and Lee appeal. We affirm in part and reverse in part.

FACTS

Thermal manufactures curing ovens, paint booths and control panels that operate manufacturing equipment. On October 5, 1987, Thermal entered into a written agreement with Lee to serve as its sales representative in the Southeastern United States.

The agreement, which was to run from year to year, provided that Lee was to be paid on a commission basis for any orders accepted by Thermal. Either party could terminate the relationship upon six months written notice; however, the agreement would remain in force for six months after notice of termination. Upon termination of the contract, Lee was entitled to commissions for accounts he generated for a period of eight months after the termination. If an order was received from one of Lee's customers during the eight months after termination then an additional eight-month period would be in effect from the order date and would continue in effect so long as orders were received during the eight-month interval.

On March 29, 1995, Thermal sent Lee notice of termination of the contract. Lee reminded Thermal of the six-month notice provision in their contract and requested an accurate accounting of any commissions that might be due during the notice period.

Thermal disputed the application of the notice provision and advised Lee that the March 29th letter had declared their contract to be at an end. Thermal further advised Lee that if he was already working on any particular projects that "Thermal [was] willing to work with [him] on a case-by-case basis so that those efforts won't be wasted." On November 9, 1995, after a demand from Lee's attorney, Thermal paid Lee $7098.42 for the undisputed, pre-termination commissions earned prior to March 29, 1995.

Lee filed this action against Thermal seeking the balance of his post-termination commissions, plus punitive damages and attorney fees. The trial court awarded Lee a judgment of $58,465.64 for all the unpaid commissions in accordance with the notice provisions of the contract. The court's order further provided Lee was entitled to reasonable attorney fees and instructed him to submit an affidavit of attorney fees within fifteen days of receipt of the order. Following a hearing, the court awarded Lee pre-judgment interest of $16,901.61 and attorney fees of $25,122. This appeal follows.

LAW/ANALYSIS

Thermal's Appeal

I. Oral Amendment of Contract

Thermal asserts the trial court committed reversible error in ruling the contract was orally amended because Lee never asserted in his pleadings that the written contract was modified. We believe the question of whether or not the contract was orally amended was presented to the trial court.

Initially, we discuss Thermal's argument that Lee's pleadings make no claim that the contract was orally amended to include "engineered" products within its terms. Thermal argues that clearly the complaint bases Lee's right to recover on the written contract and that Lee never made a motion to amend his pleadings to assert a right to recover based on an oral modification. Notwithstanding such failures, we conclude Lee's pleadings should not

preclude recovery in this case. First, we note that Thermal consistently asserted during trial that Lee was not entitled to recover because the commissions he claimed were either not based on sales personally made by him or that the sales were not of "pre-engineered" products. Thermal never asserted during trial that the pleadings limited Lee's recovery to commissions from the sale of pre-engineered products only. Having failed to object to the court's consideration of Lee's entitlement to commissions based on Lee's failure to plead a modification of the Parties agreement, Thermal is considered to have tried the issue by consent. See Simmons v. Tuomey Reg'l Med. Ctr., 330 S.C. 115, 125 n.2, 498 S.E.2d 408, 413 n.2 (Ct. App. 1998) (an issue not expressly mentioned in the complaint but tried without objection and incorporated in the trial court's order is tried by consent according to Rule 15 SCRCP); McCurry v. Keith, 325 S.C. 441, 447, 481 S.E. 2d 166, 169 (Ct. App. 1997) (issues tried by consent will be treated as if raised in the pleadings).

Secondly, even if the record on appeal could be interpreted to show Thermal raised the oral modification issue at trial, the issue must be both presented to and ruled upon by the trial court before it will be considered on appeal. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) ("It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling.").

We now move to Thermal's claim that the evidence does not support the trial court's holding that the contract in issue was orally amended. "It is true that a simple contract completely reduced to writing cannot be changed or modified by parol evidence of what was said or done by the parties at the time it was made, because the parties agree to put the contract in writing and to make the writing part, and evidence thereof." Evatt v. Campbell, 234 S.C. 1, 6, 106 S.E.2d 447, 450 (1959) (quoting Mebane v. Taylor, 164 S.C. 87, 94, 162 S.E. 65, 67 (1932)). "Nevertheless, by the rules of the common law it is competent for the parties to a simple contract in writing before any breach of

its provisions, either altogether to waive, dissolve, or abandon it, or vary or qualify its terms, and thus make a new one." Id. "A written contract may, in the absence of statutory provisions requiring a writing, be modified by a subsequent oral agreement." Id.

In this case, Best testified that Thermal entered into the written agreement with Lee for the purpose of securing orders for pre-engineered products so that its manufacturing division could continue production even when its engineering division was working on custom-designed items. Apparently, however, very few orders materialized that did not require the assistance of Thermal's in-house engineering division. Although Best stated he did not "know how [Lee] got changed over to the selling of other products," he acknowledged that Thermal paid Lee for all orders he solicited during the contract period at the same commission rate, regardless of whether the items were pre-engineered. Kerry Smith, Thermal's Vice President and General Manager of the Control Division also acknowledged that Lee was never refused a commission on the basis the order was not for a pre-engineered product. Moreover, Smith acknowledged that he discussed this with Lee, and approved of him selling engineered products.

Finally, Lee and Thermal disagree as to the definition of "pre-engineered" and "engineered". According to Lee, Thermal never had any pre-engineered products to sell. Smith acknowledged it had few, if any, pre-engineered products and that most of the products Lee sold were "engineered" as he understood the term. Counsel for Thermal maintained there was an oral agreement to sell engineered products that "ran parallel" to the written contract, but argued it was not incorporated into the written contract; therefore, the contract's notice provision was not applicable. Thermal's attorney conceded on Thermal's behalf that all of the jobs for which Lee was compensated in the November 1995 payment, following Lee's termination, were for "engineered" items.

While acknowledging that almost from the beginning Lee secured orders mostly for custom-made products that required the services of Thermal's engineering division, Thermal nevertheless paid Lee throughout the contract period for all orders he secured in his territory, not just for pre-

engineered products. Thermal also continued to pay Lee commissions, per the language of their written agreement, for orders procured by others in his territory, although Lee did not participate in bringing the orders to the company.

We agree with the trial court's finding that the parties orally modified their written contract to encompass paying Lee commissions for all products sold within Lee's exclusive territory, regardless of whether the products were pre-engineered. Accordingly, we affirm the trial court's ruling that Lee was due $58,465.64 in unpaid commissions that accrued during the period of the contract, and subsequent to termination, as per the contract's residual notice provision.

II. Prejudgment Interest Award under Rule 60(a)

Thermal next contends the trial court committed reversible error in concluding Rule 60(a), SCRCP was an appropriate vehicle for awarding prejudgment interest to Lee. We disagree.

The judgment in this case was entered on August 23, 1999, but the Clerk of Court inadvertently failed to provide either party with notice of entry of the judgment. Lee's attorney discovered the order on April 28, 2000. On May 12, 2000, Lee Filed a motion under Rule 60(a), SCRCP asserting the trial court mistakenly omitted an award of prejudgment interest from the order, and that he was entitled to prejudgment interest on the unpaid commissions as matter of law. Thermal opposed the motion, arguing Rule 60(a) was not a proper procedural mechanism for recovering prejudgment interest because the failure to include interest was not the result of a clerical mistake.

After a hearing, the trial court granted Lee's motion and awarded him prejudgment interest of $16,901.61. The court noted Lee submitted a detailed chart at trial with calculations of the prejudgment interest. "In addition, the parties agreed that the payment date for each invoice was 60 days after the invoice date, unless shown otherwise. Since payment of [Lee's] commission was due fifteen days after [Thermal] received its invoice

payments, the commissions were due seventy-five days after the invoice payment date. [Lee's] exhibit 16 calculated interest at the rate of 8 and 3/4%, per S.C. Code Ann.§ 34-31-20(A)." The court found the amount of prejudgment interest due was "easily ascertainable from [Lee's] exhibit 16." The court stated although Lee's exhibit showed interest accruing after 60 days, the amount of interest could be adjusted and "is easily ascertainable and calculable on the basis of the record before this Court."

The statutory basis for the award of prejudgment interest is section 34-31-20(A), which provides:

> In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and being due, shall draw interest according to law, the legal interest rate shall be at the rate of eight and three-fourths percent per annum.

S.C. Code Ann § 34-31-20(A) (1987) (emphasis added).

"Prejudgment interest is allowed on liabilities to pay money from the time when, either by agreement of the parties or operation of law, the payment was demandable, if the sum is certain or capable of being reduced to certainty….The right of a party to prejudgment interest is not affected by rights of discount or setoff claimed by the opposing party. It is the character of the claim and not of the defense to it that determines whether prejudgment interest is allowable." S. Welding Works, Inc. v. K & S Constr. Co., 286 S.C. 158, 164, 332 S.E.2d 102, 106 (Ct. App. 1985) (citations omitted) (emphasis added).

Rule 60(a), SCRCP provides "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders."

Wright & Miller, discussing the types of errors covered by the federal rule 60(a), which is virtually identical to South Carolina's rule, state in pertinent part:

> The court may correct clerical errors and mathematical computations. It has been held that it also may correct…the addition of costs to a judgment. The judgment may be corrected by including interest if this is a matter of right but not if allowing interest is discretionary.

11Charles A. Wright & Arthur Miller, Federal Practice and Procedure § 2854 (1973).

The commentators further state:

> There is a considerable overlap between Rule 59(e) and Rule 60. It has been held that a motion for amendment of the judgment to include prejudgment interest is under Rule 60(a), and is not subject to the time limit of Rule 59(e), if the party is entitled to interest as a matter of right, but that if allowance of prejudgment interest is in the discretion of the court then the ten-day limit of Rule 59(e) applies.

Id. § 2817 (emphasis added).

There apparently was no real dispute at trial that the statutory provision for prejudgment interest was applicable to Lee's claim. The trial court noted in its order that both parties agreed that the pleadings would be construed to assert a claim for pre-judgment interest. The court found the amount of prejudgment interest was easily ascertainable from the evidence presented during the trial.

Although it is proper to make this motion within the time limits of Rule 59(e), there is authority that where interest is available as a matter of right,

rather than discretion, the interest may properly be sought in a Rule 60(a) motion. See, e.g., State, Personnel Bd. v. Akers, 797 So. 2d 422, 426 n.4 (Ala. 2000) (holding Court has authority under Rule 60(a), Ala R. Civ. P., to correct omissions of pre-judgment interest from a judgment where the court intended to grant pre-judgment interest, but failed to do so, or where the judgment did not include pre-judgment interest mandated by law); Brooks v. Jackson, 813 P.2d 847, 849 (Colo. Ct. App. 1991) (The failure to include interest in a judgment, when the law provides for the award of pre-judgment interest, is an oversight which fits squarely within the parameters of Rule 60(a); therefore, the addition of interest to a verdict is a ministerial act that is mandatory and does not require the exercise of judgment or discretion.). But see Jennings v. Ibarra, 921 P.2d 62, 65 (Colo. Ct App. 1996) (holding a Rule 60(a) motion could not be used to include pre-judgment interest in the circumstances where it was clear the trial court did not originally intend to make such an award. The court rejected the position that a failure to include an award of mandatory pre-judgment interest is always to be viewed as an oversight or omission which is correctable at any time by amendment of the judgment under Rule 60(a).)

Because pre-judgment interest is mandatory under the statute for this type of claim, we find no error in the trial court's decision to correct this omission under 60(a), especially in light of the fact that the parties were not given notice of entry of the order in the usual manner.[1] Accordingly, we affirm the trial court's award of pre-judgment interest to Lee.

III. Sales Representatives Act,§ 39-65-10 to -80

Thermal asserts the trial court erred in applying the Sales Representatives Act, S.C. Code Ann. § 39-65-10 to –80, to Lee's claims, because Lee did not solicit wholesale orders as required by the Act.

[1] Cf.Calhoun v. Calhoun, 339 S.C. 96, 102, 529 S.E.2d 14, 18 (2000) (stating in a case involving section 34-31-20(b)'s provision for post-judgment interest, that the "[u]se of the word 'shall' in a statutory provision indicates the provision is mandatory").

Therefore, Thermal argues Lee was not entitled to punitive damages or attorney fees. We agree.

S.C. Code Ann. Section 39-65-20 (Supp. 2001) provides: "When a contract between a sales representative and a principal is terminated for any reason, the principal shall pay the sales representative all commissions that have or will accrue under the contract to the sales representative according to the terms of the contract." (emphasis added).

The Act defines a "principal" as one who:

> (a) manufactures, produces, imports, or distributes a tangible product for wholesale;
> (b) contracts with a sales representative to solicit orders for the product; and
> (c) compensates the sales representative, in whole or in part, by commission.

Id. § 39-65-10(3) (emphasis added).

A "sales representative" is a person who:

> (a) contracts with a principal to solicit wholesale orders;
> (b) is compensated, in whole or in part by commission;
> (c) does not place orders or purchase for his own account or for resale; and
> (d) does not sell or take orders for the sale of product to the ultimate consumer.

Id.§ 39-65-10(4) (emphasis added).

Where a violation of the Act has occurred, the sales representative is entitled to sales commissions plus punitive damages up to three times the

amount of commissions due, plus reasonable attorney fees and costs. Id. § 39-65-30.

"The cardinal rule of statutory construction is that we are to ascertain and effectuate the actual intent of the legislature." Burns v. State Farm Mut. Auto. Ins. Co., 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). "[W]ords used therein must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation." Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). "The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." Id. Where a word is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning. See e.g. Gulf Oil Corp. v. S.C. Tax Comm'n, 248 S.C. 267, 270, 149 S.E.2d 642, 643 (1966) (citing Webster's New International Dictionary for definition of a statute's reference to "paid-in surplus"); State v. Dickinson, 339 S.C. 194, 199, 528 S.E.2d 675, 677 (Ct. App. 2000) (citing Black's Law Dictionary for definition of "obtaining" in statute for obtaining property in fraudulent manner); State v. Estridge, 320 S.C. 288, 291, 465 S.E.2d 91, 93 (Ct. App. 1995) (referencing dictionary definition in determining legislative intent).

Thermal argues that the Act only relates to commissions earned on "wholesale orders." Thermal defines "wholesale" as the sale of goods in quantity usually for resale by a retail merchant. Thermal argues that the Act is not applicable to this case because the items manufactured by Thermal were sold for use by the purchaser or were sold to manufacturers to be included in a complete piece of operational equipment. Thermal contends that neither of these sales can be considered wholesale. Therefore it argues Lee is not a sales representative as defined by the Act and is not entitled to attorney fees or punitive damages.

Lee avers that the Legislature passed the Sales Representative Act intending to cover all workers who are not paid their wages or commissions. Lee therefore argues that interpreting the Act to limit its application to a narrower class of workers would only serve to thwart the Legislative intent behind the Act. Lee agrees with the definition for wholesale employed by the

trial court. In holding the Sale Representatives Act to be applicable in this case, the trial court stated only that it found "the definitions of 'wholesale' and 'retail' as defined in Roland Elect. Co. v. Walling, 326 U.S. 657 (1946), to be persuasive." In Roland, the Supreme Court found among other definitions, that "wholesale sales" means buying goods for the purpose of reselling them, but could also refer to sales of goods used for business purposes or made to commercial, professional, or governmental users, rather than for personal or household consumption. Id. at 674-75.[2] Lee contends that Thermal's sales would be encompassed under this definition of "wholesale", and he is thus entitled to attorney fees and punitive damages.

Our Sales Representative Act defines a sales representative for purposes of the Act as someone who "contracts with a principal to solicit wholesale orders." S.C. Code Ann. § 39-65-10(4). The South Carolina General Assembly did not include the definition of "wholesale" or "wholesaler" in this Act, and our research has revealed no South Carolina case law that has defined these terms as they relate to this Act. In interpreting the words "wholesale" and "wholesaler" we look to the plain and ordinary meaning of these words. "Wholesale" is defined as "[t]he sales of goods or commodities [usually] for resale by a retailer, as opposed to a sale to the ultimate consumer." Black's Law Dictionary 1591 (7th ed. 1999). A "wholesaler" is "[o]ne who buys large quantities of goods and resells them in smaller quantities to retailers or other merchants, who in turn sell to the ultimate consumer." Id. See Am. Delta Techs., Inc. v. RK Elec. Info. Concepts, 647 A.2d 1344, 1347 (N.J. Super. Ct. App. Div. 1994) (stating where the terms "wholesale" and "wholesale orders" were not defined in its sales representatives statutes, "reference to the usual definition of those terms would apply;" the court noted a "wholesaler" is "[o]ne who buys in comparatively large quantities, and then resells, usually in smaller quantities, but never to the ultimate consumer")(citing Black's Law Dictionary).

We are persuaded that the Legislature intended the usual dictionary meaning to apply to the term "wholesale," and in so intending, limited the

[2] Roland was superseded by statute. Hodgson v. Crotty Bros. Dallas, Inc., 450 F.2d 1268, 1272 (5th Cir. 1971).

application of this Act to a specific class of workers. We decline to extend the meaning of wholesale as advocated by Lee. Whether or not all sales representative paid commissions should be covered under this Act is a question better addressed by the Legislature.

We find support for our definition of "wholesale" in at least one other jurisdiction that has considered this issue in a case involving similar facts. In Hoffman v. Van Pak Corp., 16 S.W. 3d 684 (Mo. Ct. App. 2000), the Missouri Court of Appeals held that an employer which manufactured electrical control systems was not a principal within the meaning of its statutes allowing damages to sale representatives who are not timely paid. The employer primarily custom-manufactured each product after it was ordered and thus was mostly selling to end users, although some sales were made at wholesale. The Missouri court rejected the broader definitions of "wholesale" found in Roland Electrical Co.[3] The Hoffman court noted:

> The statute uses the word "wholesale" in defining both "principal" and "sales representative." We presume that the legislature did not insert idle verbiage or superfluous language in the statute. Each word, clause, sentence, and section of a statute should be given meaning.
>
> * * *

[3] "In Roland Electric the question before the Court was whether the exemption from the Fair Labor Standards Act for employees engaged in retail or service establishments applied to the employees of a firm which engaged in manufacturing and supplying electrical equipment and services in interstate commerce to commercial and industrial users. The Court analyzed the word "retail" by contrasting it with "wholesale." Its conclusion, that the firm in question was not a retail or service establishment under the Fair Labor Standards Act, cannot be taken out of that context and fairly be applied to the Missouri statue at issue here." Id. at 689.

> It is clear that in its use of the word "wholesale" the legislature intended to address a problem in the wholesale distribution system and wholesale markets and did not intend to create additional remedies for all salespersons who are paid by commission. Whether such a remedy should be extended to all commissioned salespeople is a question for the legislature, not the courts.

Id. at 689-90 (citations omitted).

In order to recover attorney fees and punitive damages, Lee must fit within the parameters of a "sales representative" as defined in this Act. The evidence at trial was that Lee solicited orders of control panels to manufacturers, who in turn used the items to manufacture equipment. Thus, those placing the orders were, for the most part, the ultimate consumer or end user of the products. Further, Lee himself testified that the use of the concepts of "wholesale" and "retail" have no application to his work. We find that Lee does not fit within the meaning of "sales representative" as defined by the Act, and therefore, we reverse the trial court's finding that the Sales Representative Act is applicable to Lee's claims and, consequently, reverse the court's award of attorney's fees to Lee.

Lee's Appeal

Lee contends the trial court abused its discretion in failing to award him punitive damages under the Sales Representatives Act. Because we conclude the Act was not applicable to Lee's claim, we affirm the court's denial of punitive damages.

CONCLUSION

For the foregoing reasons, we affirm the trial court's award of past due commissions and pre-judgment interest. Based on our finding that the Sales

Representative Act[4] does not apply to Lee's action because he does not deal in wholesale sales, we affirm the court's denial of punitive damages under the Act and reverse the court's award of attorney's fees. Accordingly, the decision below is

AFFIRMED IN PART AND REVERSED IN PART

STILLWELL and SHULER, JJ. concur.

[4] Because we find the Sales Representative Act is not applicable, we need not address Thermal's remaining argument that the Act's provision for attorney fees is unconstitutional.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Marietta Garage, Inc., Appellant,

v.

South Carolina Department of Public Safety, Respondent.

Appeal From Greenville County
Joseph J. Watson , Circuit Court Judge

Opinion No. 3557
Heard September 10, 2002 – Filed October 28, 2002

AFFIRMED

Robert C. Childs, III, Esq., Laura W.H. Teer, of Greenville; for Appellant

Ronald K. Wray, II, Esq., Andrea Hawkins, of Greenville; for Respondents.

GOOLSBY, J.: Marietta Garage, Inc., appeals the grant of summary judgment to the South Carolina Department of Public Safety in an action for damages Marietta allegedly sustained from the removal of its name from a wrecker rotation list. We affirm.

FACTS AND PROCEDURAL HISTORY

The South Carolina Highway Patrol, pursuant to regulations promulgated by the South Carolina Department of Public Safety, maintains wrecker rotation lists within established towing zones to provide towing services to motorists.[1] The regulations provide that, unless the owner or driver of a wrecked or disabled vehicle requests a specific wrecker service to tow the vehicle, the Patrol contacts a wrecker service from the rotation list for the zone where towing is required.[2] Companies on the list are contacted in the order in which they appear.[3] To remain on the rotation list for a particular towing zone, a wrecker service must be either physically located within the zone or maintain a separate business and storage lot within the zone.[4]

Marietta has been on various wrecker rotation lists since the Department adopted this practice. On November 8, 1995, the Patrol approved Marietta's request to be placed on the list for zone 5, where Marietta had an office and access to a storage facility. The office and storage facility were on the premises of Fender Mender, a business located at 205 North Pleasantburg Drive. Marietta had an oral agreement with Fender

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[1] At the time of the lawsuit, the pertinent regulations were found at 25A S.C. Code Ann. Regs. 63-600 (1983). These regulations were repealed on March 27, 1998, and replaced by 23A S.C. Code Ann. Regs. 38-600 (Supp. 2001). Citations in this opinion are to the regulation in effect at the time of the lawsuit.

[2] 25A S.C. Code Ann. Regs. 63-600(2), (8), (9), (10), and (11).

[3] Id. 63-600(11).

[4] Id. 63-600(8).

Mender allowing Marietta to store vehicles on Fender Mender's property in exchange for splitting the storage fees.

On February 8, 1996, the Patrol contacted Marietta to tow a vehicle belonging to Chris Busha. Busha had been involved in a single-car accident about one-half mile from Marietta's North Pleasantburg Drive location.

Robert Pritchett, Marietta's general manager, went to the scene to tow the vehicle to the North Pleasantburg Drive location. When Pritchett arrived at Fender Mender, however, he noticed the Marietta Garage sign was missing and the lock had been cut. Pritchett then towed the vehicle to Marietta's home office, which was approximately sixteen miles from the accident scene.

Subsequently, unbeknownst to Marietta, Jean Busha, Chris Busha's mother, complained to the Patrol about the towing charge for her son's vehicle. After receiving Jean Busha's complaint, Lt. Kimbrell of the Patrol drove to the North Pleasantburg Drive location and learned from the proprietors of Fender Mender that Fender Mender and Marietta had ceased doing business with each other. On February 16, 1996, Marietta was removed from the rotation list for zone 5 without a hearing and was notified in writing of the removal a few days later.

Marietta requested a hearing to contest its removal from the rotation list. The request was granted, and the hearing took place June 10, 1996. At the hearing, Marietta informed the Patrol that it had acquired a new location in zone 5. The Patrol inspected the new site and, on November 10, 1996, reinstated Marietta to the rotation list for zone 5. On November 26, 1996, however, the Department informed Marietta in writing that it was upholding the earlier decision to remove Marietta from the list "for the simple reason that the location of 205 [North] Pleasantburg Drive is no longer occupied by Marietta Garage."

After receiving this notification from the Department, Marietta filed a complaint in the circuit court against the Department requesting damages allegedly resulting from gross negligence on the part of the Department and

from the unconstitutional taking of Marietta's property rights.[5] Marietta determined it had missed about twenty rotation calls during the time it was off the rotation list for zone 5 up until the administrative hearing on June 10, 1996.

Both sides moved for summary judgment. On October 17, 1997, the circuit court issued an order denying summary judgment to Marietta and granting summary judgment to the Department.

Marietta appealed the grant of summary judgment to the Department. On September 17, 1999, this court, in a published opinion, affirmed the grant of summary judgment on Marietta's gross negligence claim, but further held the Department violated the South Carolina Administrative Procedures Act (APA) by failing to conduct a pre-removal hearing before removing Marietta from the rotation list for zone 5.[6] Because of the determination that "[t]he Department's failure to provide Marietta notice and a hearing prior to actual removal violated the APA," the case was remanded to the circuit court for further proceedings.[7]

On remand, the Department again moved for summary judgment. The circuit court granted the motion, holding (1) Marietta's claim for damages as a result of the Department's APA violation was moot, and (2) Marietta could not recover damages for inverse condemnation because it had failed to allege a compensable property interest. Again, Marietta appeals.

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[5] Marietta initially sought an appeal of the administrative decision, but deleted this request in its amended complaint.

[6] Marietta Garage, Inc. v. South Carolina Dep't of Pub. Safety, 337 S.C. 132, 522 S.E.2d 605 (Ct. App. 1999).

[7] Id. at 139, 522 S.E.2d at 608.

LAW/ANALYSIS

1. Marietta first argues the circuit court erred in ruling that its claim for damages under the APA was moot. We disagree.

"A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief."[8]

In the present case, there is no meaningful relief that either this court or the trial court could now give Marietta. In this court's prior opinion, we held the Department had violated the APA by failing to hold a hearing before removing Marietta from the rotation list.[9] Notwithstanding the finding that a violation occurred, Marietta received a hearing and was eventually reinstated to the list. The only question remaining is whether Marietta is entitled to money damages for the APA violation as compensation for the time it was not on the list.

The APA allows a party to seek judicial review upon exhaustion of administrative remedies.[10] It does not, however, specifically provide for the assessment of civil penalties against an agency found to be in violation of its provisions. We have not found—nor has Marietta directed our attention to—any authority indicating that an aggrieved party may seek money damages under the APA or under any analogous legislation absent an express provision recognizing such a claim.[11]

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[8] Mathis v. South Carolina State Highway Dep't, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973).

[9] Marietta Garage, 337 S.C. at 139, 522 S.E.2d at 608.

[10] S.C. Code Ann. § 1-23-380 (Supp. 2001).

[11] In support of its argument that the Department's APA violation warrants the imposition of money damages, Marietta cites Stoddard v. Western

2. Marietta further contends the circuit court erred in granting summary judgment to the Department on Marietta's inverse condemnation claim, contending it was "deprived . . . of a protected property right without compensation." We hold summary judgment was proper.

To prove an inverse condemnation, a plaintiff must show: (1) an affirmative, positive, aggressive act on the part of the governmental agency; (2) a taking; (3) the taking is for a public use; and (4) the taking has some degree of permanence.[12] "The threshold inquiry is whether the property interest affected is inherent in the plaintiff's ownership rights or completely dependent upon regulatory licensing."[13]

In Pritchett v. Alford,[14] the Fourth Circuit Court of Appeals held that, once a wrecker service is placed on a wrecker rotation list, it acquires a constitutionally protected property right not to be removed from the list without Fourteenth Amendment procedural due process requirements.[15] Nonetheless, we hold that, even when the record is viewed in the light most

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Carolina Regional Sewer Authority, 784 F.2d 1200 (4th Cir. 1986). Stoddard, however, concerned damages under the Federal Clean Water Act, and the Fourth Circuit Court of Appeals, in reversing the district court's refusal to assess civil penalties, noted the Act specifically authorized the award of costs and attorney fees." Id. at 1209.

[12] Gray v. South Carolina Dep't of Highways and Pub. Transp., 311 S.C. 144, 427 S.E.2d 899 (Ct. App. 1992).

[13] Rick's Amusement, Inc. v. State of South Carolina, Op. No. 25359 (S.C. Sup. Ct. filed Sept. 10, 2001) (Shearouse Adv. Sh. No. 33 at 18, 24), cert. denied, 122 S. Ct. 1909 (2002).

[14] 973 F.2d 307 (4th Cir. 1992).

[15] Id. at 317-18.

favorable to Marietta, the inverse condemnation claim must fail because there is nothing to suggest that there was a taking for a public use.

Marietta argues only that the rotation list was "a list maintained for the public's benefit." Like the plaintiff in Gasque v. Town of Conway,[16] who unsuccessfully claimed damages resulting from the refusal of the municipal authorities to grant him a permit to build and operate a gasoline filling station within the town, Marietta cannot show, either "directly or indirectly," [17] that its place on the rotation list was "subjected to a public use"[18] during the time Marietta was removed from the list.[19] At best, it has demonstrated only that its removal benefitted other wrecker services on the rotation list.

3. Marietta also contends the circuit court inaccurately portrayed several allegations as undisputed facts in the case. The specific findings with which Marietta appears to take issue concern: (1) whether Department regulations require that a lot be inspected before it is placed on the wrecker rotation list; (2) whether the rules and regulations of the Department require notification for a change of address within a zone; (3) whether Marietta at all times had maintained a storage lot within zone 5; (4) whether a predeprivation hearing was feasible; (5) whether circumstances necessitated quick removal of Marietta by the Department from the rotation list; and (6) whether there was ample opportunity for the State to provide notice and an opportunity to be heard before suspending Marietta from the wrecker rotation list. We agree with the Department that these concerns, even if resolved in Marietta's favor,

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[16] 194 S.C. 15, 8 S.E.2d 871 (1940), overruled on other grounds by McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985).

[17] Id. at 23, 8 S.E.2d at 874.

[18] Id.

[19] See Edens v. City of Columbia, 228 S.C. 563, 91 S.E.2d 280 (1956) (noting that a public use must be either a use by the public or by some quasi public agency, and not simply a use that incidentally or indirectly promotes the public interest or general prosperity).

would not affect the result in this case insofar as our holdings are based on our analysis of the APA and our determination that there was no evidence that the alleged taking was for a public use.

AFFIRMED.

HOWARD and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robert W. Binkley and Susan B. Binkley,	Appellants,
v.	
John Burry, Haynsworth, Marion, McKay & Guerard, LLP, Donald A. Harper, Greenville County and Fant Engineering & Surveying Co., Inc.,	Defendants,
Of whom Haynsworth, Marion, McKay & Guerard, LLP is	Respondent,
and	
Haynsworth, Marion, McKay & Guerard, LLP,	Third-Party Plaintiff,
v.	
Rabon Creek Watershed Conservation District of Fountain Inn, South Carolina,	Third Party Defendant.

Appeal From Greenville County

H. Dean Hall , Circuit Court Judge

Opinion No. 3558
Heard September 10, 2002 – Filed October 28, 2002

AFFIRMED

Keith M. Babcock, of Columbia; Michael Stephen Chambers, of Greenville; for Appellants

John E. Johnston, of Greenville; for Respondents.

GOOLSBY, J.: This is a legal malpractice action. The trial court granted summary judgment to Haynsworth, Marion, McKay & Guerard, LLP (Haynsworth), holding Robert W. Binkley and Susan B. Binkley failed to file their lawsuit within the applicable limitations period. The Binkleys appeal. We affirm.

FACTS AND PROCEDURAL BACKGROUND

The Binkleys purchased lakefront property in the Lakeview Acres subdivision in Greenville County, South Carolina. Haynsworth conducted the closing on Lot 8, the subject property, on April 19, 1991.

On May 2, 1991, Haynsworth sent the Binkleys their deed to Lot 8 along with a letter indicating the law firm had performed a title examination of the property. According to the letter, Haynsworth concluded the Binkleys were vested with a marketable fee simple title to the premises, subject to several exceptions. Included in the list of exceptions was an "[e]asement for construction and impoundment given to Rabon Creek Watershed Conservation District recorded in Deed Book 211 at Page 657, Office of the Clerk of Court for Laurens County and Deed Book 1169 at Page 88 in the

RMC Office for Greenville County." The Binkleys, however, assumed the mailing contained only the deed to their property, and Robert Binkley placed it in his safe without reading it. This letter was apparently the only communication between Haynsworth and the Binkleys about the easement.

On August 7, 1991, the Binkleys entered into a contract for the construction of their home on Lot 8. The contract noted the first floor of the home would be constructed two feet above the 100-year floodplain level. In his deposition, however, Robert Binkley conceded that, before construction of the home commenced, he was aware that the lower level of the building would be in the floodplain.[1]

On November 4, 1991, Haynsworth closed on a mortgage given by the Binkleys to American Federal Bank and secured by Lot 8. A few days before the closing, a plat had been prepared indicating the elevation of the dam spillway would be higher than the elevation of the lower level of the Binkleys' proposed home. Robert Binkley admitted he saw the plat and was aware of the elevations. Furthermore, the Binkleys signed a release at the closing that stated they knew the basement of their home was within the 100-year floodplain level. The Binkleys waived the option of flood insurance and proceeded with construction on their home.

The Binkleys subsequently purchased Lot 9 in Lakeview Acres. Lot 9 lies next to Lot 8 and is also lakefront property. Haynsworth performed the closing on March 2, 1992. This time, however, Haynsworth did not conduct a title search on the property.

In August 1995, heavy rains caused water impounded by the Rabon Creek Watershed District to back up onto the Binkleys' property and flood the basement of their home. After the flood, Rabon Creek informed the Binkleys and other homeowners affected by the rain that it claimed an easement to the top of the dam and set out flags to indicate the boundary lines

[1] Robert Binkley also admitted that, when he looked at Lot 8, he understood there was a dam close by that was owned by a public entity and the land upstream from the dam could be flooded "up to probably the spillway."

of the easement around the lake. The pin locations indicated that the easement claimed by Rabon Creek covered all of Lot 8 and almost all of Lot 9. It was only after the flood that the Binkleys read the letter from Haynsworth advising them of the easement that encumbered Lot 8.

On June 7, 1996, the Binkleys sued Rabon Creek. In addition to damages, the Binkleys sought a declaratory judgment regarding the extent and enforceability of the easement. (Binkley I) Rabon Creek counterclaimed for a declaratory judgment, asking the court to construe the easement and determine its extent.

Both sides moved for summary judgment on the interpretation of the easement agreement. The trial court, Judge Kittredge presiding, held a hearing on the motions on September 17, 1996. On December 23, 1996, Judge Kittredge issued an order on the motions holding (1) the language of the easement was ambiguous as to its extent and scope, thus necessitating resort to the intention of the parties to the easement; (2) the parties intended the easement to allow Rabon Creek to "store" water to create a lake level of 700.5 feet; and (3) during periods of heavy rain, Rabon Creek could allow the "flowage" of water up to and over the top of the dam to an elevation of 725.2 feet.[2] The order further noted that "[v]arious issues remain to be determined," such as the Binkleys' contention that Rabon Creek should not be allowed to enforce the easement for equitable reasons. Pursuant to Rule 54(b) of the South Carolina Rules of Civil Procedure, final judgment was entered to the extent of the issues decided by the order.[3] By consent of the parties, all remaining claims and defenses were dismissed with prejudice.

On February 27, 1997, the Binkleys commenced this action against Haynsworth alleging Haynsworth committed professional malpractice in

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[2] The order, however, further noted that "the spillway (assuming proper operation) will almost certainly preclude 'flowage' beyond 718 feet."

[3] See Rule 54(b), SCRCP (stating "[w]hen more than one claim for relief is presented in an action . . . , the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties").

"failing to disclose the existence of the [e]asement or its impact."[4] (Binkley II) On August 7, 1997, Judge Kittredge signed a consent order consolidating this lawsuit with cases brought by other homeowners who had experienced flooding during the same event that damaged the Binkleys. This consolidation was for the limited purposes of construing the extent of the easement and considering the affirmative defenses to enforcement of the easement. On September 8, 1997, Haynsworth filed an answer, cross-complaint, and third-party complaint against Rabon Creek in Binkley II, alleging among other things that Rabon Creek was estopped from enforcing the easement against the Binkleys and other homeowners. Judge Kittredge issued an order on September 12, 1997, in which he granted summary judgment as to the existence of the easement but found that genuine issues of material fact existed as to its scope and extent. After a trial on the merits on February 17 and 18, 1998, Judge Kittredge issued an order on May 5, 1998, construing the easement documents and finding Rabon Creek was estopped from enforcing the easement against the homeowners, but could enforce it against John Burry, the party granting the easement.

In the meantime, on August 19, 1997, the Binkleys moved under Rule 60 of the South Carolina Rules of Civil Procedure for relief from the summary judgment order in Binkley I issued by Judge Kittredge on December 23, 1996. Later, on June 30, 1998, the Binkleys moved to amend their complaint to assert a claim for equitable relief based on the doctrine of estoppel and to assert causes of action against Rabon Creek based on inverse condemnation, negligence, and trespass. Finding his December 1996 order in Binkley I contained inconsistencies that would prejudice the Binkleys, Judge Kittredge vacated the order and, on October 2, 1998, granted the Binkleys' motion for consolidation.

[4] In addition to Haynsworth, the Binkleys also named as defendants John Burry, the developer of Lakeview Acres; Donald Harper, their predecessor-in-title for Lot 9; Greenville County; and Fant Engineering and Surveying Company.

Rabon Creek appealed both Judge Kittredge's order limiting its enforcement of the easement to Burry and Judge Kittredge's order vacating his order of December 23, 1996, and consolidating Binkley I and Binkley II. On appeal, this court held (1) the easement extended to the top of the dam; (2) the recording of the easement gave constructive notice to the homeowners; and (3) Rabon Creek was not equitably estopped from enforcing the easement.[5]

While Rabon Creek's appeal was pending, the Binkleys' malpractice claim proceeded in the trial court. On December 7, 1998, Haynsworth moved for summary judgment, alleging the claim was barred by the statute of limitations.

On March 8, 2000, the trial court, Judge Hall presiding, held a hearing on the motion. On March 15, 2000, Judge Hall issued an order granting summary judgment to Haynsworth on the ground that the Binkleys' malpractice claim was untimely as to their purchases of both Lot 8 and Lot 9. On March 24, 2000, the Binkleys moved for reconsideration, alteration, or amendment of the judgment pursuant to Rules 59(e) and 60(b) of the South Carolina Rules of Civil Procedure. Judge Hall denied their motion by order dated April 24, 2000.

LAW/ANALYSIS

I. NOTICE

The Binkleys first argue that, "[b]ecause the issue of notice had been previously litigated and decided in Judge Kittredge's Order, Judge Hall erred in re-addressing this issue and deciding it in a way that is in conflict with Judge Kittredge's previous Order." In support of their position, the Binkleys contend (1) the prior pending appeal of Judge Kittredge's order divested the trial court of jurisdiction to decide this issue; (2) the findings in Judge Kittredge's prior order are the law of the case; (3) Judge Hall did not have the

[5] Binkley v. Rabon Creek Watershed Conservation Dist., 348 S.C. 58, 558 S.E.2d 902 (2001).

power to review, modify, affirm, or reverse Judge Kittredge's findings; and (4) Haynsworth was judicially estopped from adopting a position that was contrary to the position it took on that issue in the prior hearing before Judge Kittredge. We disagree with these arguments.

A. Jurisdiction

At the summary judgment motion hearing before Judge Hall, the Binkleys argued the motion should be stayed while the appeal of Judge Kittredge's order was pending.

As noted in this court's prior opinion, Judge Kittredge's order held as follows:

> 1) the language of the easement was ambiguous, but other evidence demonstrated the parties intended for the easement to extend to the top of the dam; 2) the Homeowners did not have actual or constructive knowledge that Rabon Creek claimed an easement to the top of the dam; and 3) Rabon Creek was equitably estopped from enforcing the easement against the Homeowners.[6]

Once an appeal is filed, the appellate court has exclusive jurisdiction over the matter.[7] The tribunal from which the appeal is taken, however, may proceed with matters unaffected by the appeal.[8]

In contrast to the issues before Judge Kittredge, the issue before Judge Hall was whether Haynsworth's disclosure to the Binkleys of the presence of the easement put the Binkleys on inquiry notice that "some claim against

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[6] Binkley, 348 S.C. at 66, 558 S.E.2d at 906.

[7] Rule 205, SCACR.

[8] Id.

another party might exist."[9] Because the accrual date for determining when the statute of limitations had begun to run did not depend on findings concerning the extent and enforceability of the easement, we hold Judge Hall was correct in proceeding with the summary judgment motion.

B. Law of the Case

The Binkleys further argue that, because Haynsworth had chosen not to appeal Judge Kittredge's order, Haynsworth must accept the rulings in that order as the law of the case.[10] As with the Binkleys' argument concerning jurisdiction, we hold the question of notice regarding the existence of an easement is distinct from the question of notice as it relates to the scope and enforceability of the easement. We therefore hold that, although the law of the case doctrine may preclude Haynsworth from challenging Judge Kittredge's finding that the Binkleys did not have notice of the scope and enforceability of the easement, the doctrine does not prevent Haynsworth from raising the issue of when the Binkleys had notice of the existence of the easement.

C. Judge Hall's Authority to Review Judge Kittredge's Order

The Binkleys argue that Judge Hall effectively reversed Judge Kittredge's prior order. We disagree.

Generally, one circuit court judge may not reverse or modify the order of another circuit court judge.[11] In the present case, the issues before Judge

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[9] Dorman v. Campbell, 331 S.C. 179, 184, 500 S.E.2d 786, 789 (Ct. App. 1998) (emphasis added).

[10] See Priester v. Brabham, 230 S.C. 201, 95 S.E.2d 167 (1956) (holding that, because there was no exception to the ruling of the court below, that ruling, right or wrong, was the law of the case).

[11] Enoree Baptist Church v. Fletcher, 287 S.C. 602, 340 S.E.2d 546 (1986); State ex rel. Medlock v. Love Shop, Ltd., 286 S.C. 486, 334 S.E.2d 528 (Ct. App. 1985).

Kittredge and Judge Hall were easily distinguishable. Judge Kittredge determined that Rabon Creek's easement was ambiguous, that the homeowners had no actual or constructive notice of it, and that the doctrine of equitable estoppel limited Rabon Creek's enforcement rights. Judge Hall addressed the question of when the Binkleys knew or should have known that they had a potential claim for legal malpractice against Haynsworth and determined that they had at least inquiry notice of their claim when Haynsworth advised them that the easement existed.[12]

D. Judicial Estoppel

The Binkleys argue that Haynsworth, as a party to and a participant in the litigation before Judge Kittredge "took the position that [a]ppellants and the other homeowners did not have notice that the flood easement burdened their property" and "should therefore be judicially estopped from adopting a conflicting position on the issue of notice for purposes of its summary judgment motion." In our view, however, the doctrine of judicial estoppel is inapplicable here.

"Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation."[13] "The purpose or function of the doctrine is to protect the integrity of the judicial process or the integrity of courts rather than to protect litigants from allegedly improper or deceitful conduct by their adversaries."[14] Generally, the doctrine applies to

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[12] See S.C. Code Ann. § 15-3-535 (Supp. 2001) (requiring that an action for personal injury "must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action").

[13] Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997).

[14] Id.

only inconsistent statements of fact and not to conclusions of law or assertions of different legal theories.[15]

At the hearing before Judge Kittredge, Haynsworth took the position that the easement could not be enforced against the Binkleys and other homeowners because the easement documents were vague and ambiguous and because Rabon Creek failed to notify the homeowners that it claimed an easement to the top of the dam. When the case came before Judge Hall on Haynsworth's summary judgment motion, the question was not the interpretation of the easement but when the Binkleys had knowledge sufficient to put a reasonable person in their situation on notice of the existence of a possible claim against Haynsworth.

II. SUMMARY JUDGMENT

The Binkleys argue there was a question of fact as to when they were put on notice that they had a claim against Haynsworth and summary judgment was therefore inappropriate. We disagree.

A. Lot 8

The Binkleys do not dispute the premise that the applicable limitations period for their claim against Haynsworth is three years.[16] Moreover, they do not take issue with the principle that "actions must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action."[17]

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[15] Id.

[16] See S.C. Code Ann. § 15-3-530 (Supp. 2001) (providing for a three-year limitations period for "an action upon a contract, obligation, or liability, express or implied").

[17] Id. § 15-3-535 (emphasis added).

Reviewing the evidence in the light most favorable to the Binkleys, we hold Judge Hall correctly determined that, as a matter of law, they knew or by the exercise of reasonable diligence should have known that they had a cause of action no later than November 4, 1991. Robert Binkley admitted he received Haynsworth's letter dated May 2, 1991, advising him and his wife about the existence of the easement in question. Moreover, the Binkleys knew their property was located near the spillway. Indeed, Robert Binkley took specific steps to ensure that the main living floor of the house would be above the floodplain level.

In addition, at the loan closing on November 4, 1991, the Binkleys signed a release indicating they had actual knowledge that their property was in a floodplain, but elected not to purchase flood insurance.

Without question, then, as early as May 1991, the Binkleys had inquiry notice of a possible claim against Haynsworth regarding the easement. By November 4, 1991, they had actual notice of the risk of flooding to their property.[18] The Binkleys had, then, the responsibility to investigate their claim once they had information that would place a reasonable person on notice that they had a possible cause of action.

Finally, we reject the Binkleys' argument that knowledge of the existence of the easement was insufficient to provide them with notice that they may have sustained damages. An easement by its very nature involves

[18] We are unpersuaded by the Binkleys' argument regarding the difference between a flood easement and a floodplain. As noted in Haynsworth's brief, although the concepts are distinct, an easement may give someone the right to create a floodplain, which is what happened in this case. Haynsworth's notification to the Binkleys of the existence of the easement should have prompted them to investigate the situation further to determine what they would face if the easement were to be enforced.

the right to encroach upon another's property.[19] Moreover, once a reasonable person has reason to believe "that some right of his has been invaded or that some claim against another party might exist,"[20] the requirement of reasonable diligence to investigate this information further takes precedence over the inability to ascertain the amount of damages or even the possibility that damages may be forthcoming at all.[21]

B. Lot 9

The Binkleys state in their brief that all the arguments advanced regarding Lot 8 apply equally to Lot 9. Because we have upheld Judge Hall's determination that the Binkleys' malpractice action regarding Lot 8 was barred by the statute of limitations, we likewise hold their action concerning Lot 9 was untimely as well.

AFFIRMED.

HOWARD and SHULER, JJ., concur

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[19] See Steele v. Williams, 204 S.C. 124, 28 S.E.2d 644 (1944) (stating an easement is the right of one person to use the land of another for a specific purpose).

[20] Dorman, 331 S.C. at 184, 500 S.E.2d at 789.

[21] See Dean v. Ruscon Corp., 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996) ("[T]he fact that the injured party may not comprehend the full extent of the damage is immaterial.").