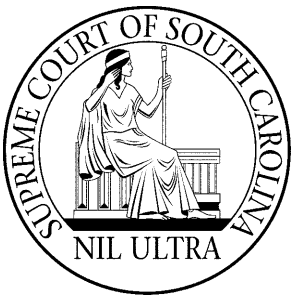


# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 38**
**August 31, 2009**
**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

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# The Supreme Court of South Carolina

Brian Major, #176677, Respondent,

v.

South Carolina Department of Probation Parole and Pardon Services, Appellant.

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ORDER

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The petition for a rehearing is denied. The attached opinions are, however, substituted for the opinions previously filed in this matter.

s/ Jean H. Toal C.J.
s/ John H. Waller, Jr. J.
s/ Donald W. Beatty J.

We would grant rehearing.

s/ Costa M. Pleicones J.
s/ John W. Kittredge J.

Columbia, South Carolina

August 24, 2009

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Brian Major # 176677, Respondent,

v.

South Carolina Department of Probation, Parole and Pardon Services, Appellant.

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John D. Geathers, Administrative Law Court Judge

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Opinion No. 26672
Heard February 5, 2009 – Refiled August 24, 2009

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**AFFIRMED AS MODIFIED**

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Deputy Director of Legal Services Teresa A. Knox, Assistant Chief Legal Counsel J. Benjamin Aplin, Legal Counsel Tommy Evans, Jr., of Columbia, for Appellant.

W. Gaston Fairey, of Columbia, for Respondent.

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**JUSTICE BEATTY:** In this case, the South Carolina Department of Probation, Parole and Pardon Services (the Department) appeals the Administrative Law Court's (ALC's) decision that the

Department erred in its interpretation of section 16-23-490[1] of the South Carolina Code of Laws regarding the implementation of the sentence imposed by the trial court and Brian Major's eligibility for parole. This Court granted the request of the Court of Appeals for certification pursuant to Rule 204(b), SCACR.

## FACTS

On February 8, 1996, Major was convicted of murder and possession of a weapon during the commission of a violent crime. The trial judge sentenced Major to a term of life imprisonment for murder and five years imprisonment for the weapons charge. The sentencing sheet for the weapons offense merely stated "consecutive."

On May 8, 2002, the South Carolina Department of Corrections (DOC) informed Major that he was no longer eligible for parole on his life sentence[2] because he could not begin serving the five-year weapons charge sentence until he completed his life sentence for murder. The DOC's notification was based on the Department's interpretation of section 16-23-490.

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[1] Although the code provision in effect at the time Major committed the offenses in 1990 has since been amended, we cite to the current version of section 16-23-490 given there have been no substantive changes that would affect the decision in this case. Act No. 184, 1993 S.C. Acts 3292.

Section 16-23-490 provides for additional punishment for persons possessing a weapon during the commission of a violent crime. Persons who are in possession of a firearm or knife during the commission of a violent crime, and are convicted of the underlying violent crime, must additionally be sentenced to five years in prison. S.C. Code Ann. § 16-23-490(A) (2003). The five-year sentence is mandatory and non-parolable. S.C. Code Ann. § 16-23-490(B), (C) (2003). The statute further provides that a sentencing court may make the additional five years consecutive or concurrent. S.C. Code Ann. § 16-23-490(B) (2003).

[2] At the time Major committed the murder, the applicable statute provided for parole eligibility after the service of twenty years on a sentence of life imprisonment. S.C. Code Ann. § 16-3-20(A) (1985).

In a PCR application, Major challenged the Department's interpretation of his sentence and the denial of parole eligibility. The PCR judge dismissed the application without prejudice so that the issues could be properly raised in the ALC in accordance with Al-Shabbaz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000).[3] Major timely filed a petition for a writ of certiorari for this Court to review the PCR judge's order.

While awaiting a hearing before the ALC and a decision by this Court, Major filed a motion for clarification of his sentence. Relying on this Court's decision in Tilley v. State, 334 S.C. 24, 511 S.E.2d 689 (1999),[4] Major challenged the sequence in which he was to serve his

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[3] Al-Shabbaz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000) (holding inmate was entitled to seek judicial review under Administrative Procedures Act after Department reached its final decision).

[4] In Tilley, the defendant pled guilty to kidnapping, first-degree criminal sexual conduct, and possession of a firearm during the commission of a violent crime. He was sentenced to life imprisonment for kidnapping, eighteen years for first-degree CSC, and five years for possession of a weapon during the commission of a violent crime. The sentences were to be served consecutively. Tilley, 334 S.C. at 26, 511 S.E.2d at 690.

Tilley filed a PCR application after the Department informed him by letter that he was ineligible for parole due to the consecutive nature of the sentencing structure. Even though, in theory, Tilley was eligible for parole he was essentially ineligible because he was required to serve out his life term before serving the mandatory five-year term. Id. at 27, 511 S.E.2d at 691.

The PCR judge granted Tilley relief on this issue. Because the sentencing judge did not order that Tilley's sentences be served in a particular sequence, only that they be served consecutively, the PCR judge ordered that Tilley's sentences be served in a way that corrected the Department's interpretation of his sentence. Id. at 28-29, 511 S.E.2d at 692.

This Court agreed with the PCR judge's decision to rearrange the order of Tilley's sentences, placing the mandatory weapons sentence first, then the eighteen-year sentence for CSC, and finally the life sentence for kidnapping. The Court reasoned that the order would still effectuate the intent of the sentencing court, but the consecutive, mandatory five-year sentence on the weapons charge

sentences. Specifically, Major claimed that he had already served the five-year weapons charge sentence given he was awarded almost five years of credit for time served since his conviction. Thus, in light of Tilley, Major asserted that he should only be serving a life sentence which would make him eligible for parole. Under the Department's interpretation, Major averred that he would never be eligible for parole because he must serve his life term before serving the mandatory, five-year sentence.

Without a hearing, the trial judge denied Major's motion, explaining the sentence needs no clarification.

Following the circuit court judge's decision, Major sought another review by the Department of his parole eligibility. The Department issued a "final decision" and informed Major that he was not eligible for parole. As part of this notification, the Department informed Major that he had the right to appeal its decision to the ALC. Major moved for rehearing by the Department.

In the interim, having granted Major's petition for a writ of certiorari to review the PCR judge's dismissal of his PCR application, this Court issued an opinion on December 11, 2006 in which it affirmed the decision of the PCR judge. Major v. State, Op. No. 2006-MO-042 (S.C. Sup. Ct. filed Dec. 11, 2006). Citing Al-Shabazz, this Court explained that "Major must pursue his requested relief through the procedures provided in the Administrative Procedures Act in order to have his sentence reordered in accordance with our decision in Tilley v. State, 334 S.C. 24, 511 S.E.2d 689 (1999) (holding that the consecutive nature of the sentence does not mandate that the sentence be served in a specific order absent the sentencing court's clear articulation that the sentence be served in a specific order)."

Because of the procedural posture of Major's case, the Department delayed its final "rehearing" of Major's challenge to the

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would not affect parole eligibility on the other offenses. Id. at 29, 511 S.E.2d at 692.

agency's determination of his parole eligibility until after this Court issued its decision. On February 16, 2007, the Department sent Major a "final decision" letter, affirming its prior determination that he was ineligible for parole and directing him to file an appeal with the ALC.

Major filed his notice of appeal with the ALC. In his notice of appeal, Major argued that the Department incorrectly interpreted section 16-23-490 to require him to complete his life sentence on his murder conviction before beginning his five-year sentence on the weapons charge. Because the sentencing judge did not make any statement at the time of sentencing that the sentences were to be served in a specific order, Major claimed that his sentences should be "reordered" to comply with this Court's decision in Tilley.

The ALC issued an order reversing the Department's determination that Major was ineligible for parole. The ALC prefaced its decision by stating that criminal sentences must be interpreted in light of the sentencing judge's intent. In view of this principle, the ALC concluded that substantial evidence would not support the Department's finding "that the sentencing court intended for the five-year sentence to commence after [Major] completes his life sentence."

Ultimately, the ALC held that the Department erred in sequencing the sentences such that Major would never be eligible for parole. In so holding, the ALC reasoned "[t]here is no basis in logic or in the law for the intent to require an offender to serve an additional sentence after the completion of a life sentence." The ALC further stated "[t]he imposition of such a sentence would be a meaningless act absent the specific intent to preclude that individual from ever becoming eligible for parole. Further, the inference of such [ ] intent presumes that the sentencing judge was willing to invade the province of the legislature by circumventing its parole eligibility laws."

The Department appealed the ALC's decision to the Court of Appeals. This Court granted the Court of Appeals' request for certification.

## DISCUSSION

The Department asserts the ALC erred in reversing its determination that Major is not parole eligible. Based on the terms of section 16-23-490 and the sentence structure imposed by the sentencing judge, the Department claims that Major is effectively serving a life sentence without eligibility for parole. The Department contends the sentencing judge's initial order indicated a clear intention for Major to serve the five-year mandatory term after completion of his life sentence. However, even if the original sentence could be construed as ambiguous, the Department avers that the sentencing judge clarified any question regarding his intention in the written order denying Major's motion for sentence clarification.

Essentially, the Department claims the sentencing judge definitively ordered that Major was to serve the five-year weapons sentence at the conclusion of his life sentence for murder thereby denying Major an opportunity for parole.

The decision of the ALC should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law. S.C. Code Ann. § 1-23-610(B) (Supp. 2008); Olson v. S.C. Dep't of Health & Envtl. Control, 379 S.C. 57, 63, 663 S.E.2d 497, 500-01 (Ct. App. 2008) ("[T]his court can reverse the ALC if the findings are affected by error of law, are not supported by substantial evidence, or are characterized by abuse of discretion or clearly unwarranted exercise of discretion."). The ALC's order should be affirmed if supported by substantial evidence in the record. Olson, 379 S.C. at 63, 663 S.E.2d at 501.

At least facially, our decision in Tilley supports a finding that the ALC properly reordered the sequence of Major's sentences to ensure parole eligibility given the sentencing sheets do not clearly articulate a particular order for which Major's sentences were to be served other than that they were to be "consecutive." This position is also bolstered

by this Court's order affirming the PCR judge's dismissal of Major's PCR application, wherein we stated "Major must pursue his requested relief through the procedures provided in the Administrative Procedures Act in order to have his sentence reordered in accordance with our decision in Tilley v. State, 334 S.C. 24, 511 S.E.2d 689 (1999)." Major v. State, Op. No. 2006-MO-042 (S.C. Sup. Ct. filed Dec. 11, 2006).

Because our decision in Tilley left some questions unanswered, we take this opportunity to expound on the decision in Tilley and address fundamental issues concerning the role of the General Assembly, the authority of a sentencing judge, and the discretion of the Department with respect to an inmate's parole eligibility when a defendant is convicted of multiple offenses resulting in consecutive sentences.

We preface our analysis with the general principle that parole is a privilege, not a matter of right. State v. Dingle, 376 S.C. 643, 649, 659 S.E.2d 101, 104 (2008); Sullivan v. S.C. Dep't of Corr., 355 S.C. 437, 443 n.4, 586 S.E.2d 124, 127 n.4 (2003). Parole is a creature of statute and is exclusively in the province of the legislative branch of government. The General Assembly empowers the Department to administer the parole program.

The General Assembly established this parole privilege and identified which criminal offenses are parole-eligible by statute. See Hair v. State, 305 S.C. 77, 79, 406 S.E.2d 332, 334 (1991) (discussing parole eligibility of certain offenses established by the General Assembly's enactments); State v. De La Cruz, 302 S.C. 13, 16, 393 S.E.2d 184, 186 (1990) (noting that the penalty established for a particular crime is purely a matter of legislative prerogative, and that "[i]f the legislature so chooses, parole may not be made available to those who commit certain offenses").

Confined by these legislative enactments, and the doctrine of separation of powers, a sentencing court is not authorized to determine parole eligibility. Instead, a court's final judgment in a criminal case is

the pronouncement of the sentence which includes the ability to designate whether sentences run concurrent or consecutive, subject to statutory restrictions. State v. McKay, 300 S.C. 113, 115, 386 S.E.2d 623, 623 (1989); see De La Cruz, 302 S.C. at 15, 393 S.E.2d at 186 ("Judicial discretion in sentencing, in suspending sentences, and in designating that sentences run concurrent or consecutive is subject to statutory restriction.").

In effectuating a sentencing court's order, the Department has the sole authority to look to the statutes to determine whether a defendant is eligible for parole separate and apart from the court's authority to sentence a defendant. See Dingle, 376 S.C. at 649, 659 S.E.2d at 104-05 (noting that the Department has the sole authority to determine parole eligibility separate and apart from the court's ability to sentence); Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs., 377 S.C. 489, 496, 661 S.E.2d 106, 110 (2008) (same).

Nevertheless, a court may order the Department to structure a sentence in such a way as to carry out the intent of the parties with regard to parole. Tilley, 334 S.C. at 28-29, 511 S.E.2d at 692 (ordering the Department to consider the consecutive, five-year mandatory term for possession of a firearm as being served first such that the prisoner would be considered eligible for parole as the parties had intended).

Our law, however, is well-established that a sentencing judge does not have the authority to determine parole eligibility through sentencing. McKay, 300 S.C. at 115, 386 S.E.2d at 623. A sentencing court only has the ability to order whether a sentence is consecutive or concurrent. See S.C. Code Ann. § 16-23-490(B) (2003) (providing that a sentencing court may make the additional five years consecutive or concurrent). In other words, a sentencing judge has the authority to structure a sentence but this authority is specifically limited by the intention of the General Assembly in its legislative enactments concerning parole-eligible offenses and an inmate's service of a sentence. The General Assembly has not statutorily authorized the courts or the Department to nullify its power to grant parole or determine parole-eligible offenses.

The General Assembly has specifically identified certain crimes where the sentence must be consecutive and must be served last in time. See, e.g., S.C. Code Ann. § 16-15-395(D) (Supp. 2008) (providing that the sentence of a person convicted of first-degree criminal exploitation of a minor "must run consecutively with and commence at the expiration of another sentence being served") (emphasis added). Clearly, the General Assembly does not intend to define consecutive to mean last in time. Significantly, the General Assembly has not indicated that a consecutive sentence on a weapons charge must be served last. S.C. Code Ann. § 16-23-490(B) (2003).

With these principles in mind, we turn to the facts of the instant case. Initially, we note that it is not entirely clear what the sentencing judge intended as the sequence for Major's sentence given there was no clear pronouncement in the sentencing sheets.

However, even if the items in this case are construed as expressing a clear intent by the sentencing judge for Major to serve his murder sentence before the weapons sentence, we find the judge was not authorized to make Major's normally parole-eligible sentence ineligible for parole. An order to this effect would essentially create a *de facto* life without parole sentence which would defeat the parole privilege created by the General Assembly for Major's murder charge. Clearly, this would be a violation of the separation of powers doctrine.

Moreover, the Department's construction of the sentencing judge's intent and interpretation of the law contradicts this Court's pronouncement and rationale announced in State v. Atkins, 303 S.C. 214, 399 S.E. 2d 760 (1990). In Atkins, this Court said "for purposes of parole eligibility, consecutive sentences should be treated as one general sentence by aggregating the periods imposed in each sentence." Id. at 219, 399 S.E.2d at 763 (citing Mims v. State, 273 S.C. 740, 259 S.E. 2d 602 (1979)). More importantly, for purposes of this case, the Atkins Court concluded that "[m]ultiple life sentences cannot be aggregated in the imposition of prison time. Accordingly, they are to be considered as one general sentence, the parole eligibility for which

is 20 years."[5] Id. This Court recognized its limitations and refused to invade the province of the General Assembly.

Adopting the reasoning of the Atkins' Court, it follows that if a consecutive life sentence could not nullify parole eligibility on a parolable life sentence, then a five-year consecutive sentence cannot either.

The question now becomes what is the efficacy of a consecutive sentence? The answer is two fold. First, following the guidance of Mims, the time is aggregated and parole eligibility is calculated on the aggregated sentence. Secondly, if the consecutive sentence is a non-parolable offense then its sentence must be served and credited first against the aggregated sentence. This is necessary to give effect to the legislative grant of parole eligibility on the parole-eligible offense.[6]

Considering the above discussion, the meaning of "consecutive" needs further attention. Because this term is not defined in our code of laws, we must employ the rules of statutory construction to ascertain and effectuate the intent of the General Assembly. See Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."); Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) (stating 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); Lee v. Thermal Eng'g Corp., 352 S.C. 81, 91-92, 572 S.E.2d 298, 303 (Ct. App. 2002) ("Where a word is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning.").

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[5] Atkins, like Major, was charged under the old law. The old law allowed parole after service of twenty years. Atkins, 303 S.C. at 219, 399 S.E.2d at 763.

[6] The argument that this approach is contrary to prior practice was made in part by the dissent in Atkins to no avail.

"Consecutive" means sentences run successively and the service of the sentence cannot run at the same time as the other sentences. See Black's Law Dictionary 1367 (7th ed. 1999) (defining "consecutive sentences" as "[t]wo or more sentences of jail time to be served in sequence. For example, if a defendant receives consecutive sentences of 20 years and 5 years, the total amount of jail time is 25 years. – Also termed *cumulative sentences*; *accumulative sentences*."); Webster's Concise Dictionary 150 (2003) ("Following in uninterrupted succession; successive."); see generally R.P.D., Annotation, When Sentences Imposed by the Same Court Run Concurrently or Consecutively; and Definiteness of Direction with Respect Thereto, 70 A.L.R. 1511 (1931 & Supp. 2008) (outlining cases and discussing question of whether sentences on different counts or different offenses were intended to be served concurrently or consecutively and whether the sentence or sentences were sufficiently definite for the purpose intended).

Thus, a notation that a sentence is "consecutive," for sentencing purposes, does not necessarily delineate that the particular sentence has to run last. It merely indicates that all the sentences are to run successively, and not to run at the same time. See Atkins, 303 S.C. at 219, 399 S.E.2d at 763 (noting that "for purposes of parole eligibility, consecutive sentences should be treated as one general sentence by aggregating the periods imposed in each sentence"). Therefore, despite the fact that the weapons sentence was the last one imposed and it was denoted as "consecutive" there was no indication that the weapons sentence was to be the last sentence to be served. See Tilley, 334 S.C. at 28-29, 511 S.E.2d at 692 (ordering the Department to treat the consecutive weapons sentence as being served first such that the inmate could be considered for parole).

The General Assembly has specifically noted several crimes with limits on parole, and it has not indicated that a mandatory weapons conviction will affect parole eligibility. See, e.g., S.C. Code Ann. § 16-3-20(A) (Supp. 2008) (holding a person convicted of murder with aggravating circumstances is not eligible for parole); S.C. Code Ann. § 16-11-330(A) (2003) (providing that a person convicted of committing

a robbery while armed with a deadly weapon must be sentenced to a mandatory minimum of ten years up to a maximum of thirty years, and the person will not be parole eligible until he or she has served at least seven years).

Because there is no indication in section 16-23-490 that the General Assembly intended the mandatory five-year sentence to completely negate any possibility of parole on other parolable offenses, we conclude the Department's interpretation of section 16-23-490 was erroneous given its decision amounts to a denial of parole eligibility for an offense the General Assembly has determined is eligible for parole.[7]

## CONCLUSION

Based on the terms of section 16-23-490 and the respective roles of the General Assembly, the sentencing court, and the Department, we hold the ALC correctly concluded that the Department erred in its determination of Major's parole eligibility. We modify the ALC's order to the extent the ALC based its decision solely on the Department's erroneous interpretation of the sequence of Major's sentences. Accordingly, the decision of the ALC is

**AFFIRMED AS MODIFIED.**

**WALLER, J., concurs. TOAL, C.J., concurring in a separate opinion. PLEICONES, J., dissenting in a separate opinion in which KITTREDGE, J., concurs.**

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[7] Interestingly, service of the five-year mandatory, no-parole sentence is not always required. See S.C. Code Ann. § 16-23-490(B) (2003) ("Service of the five-year sentence is mandatory unless a longer mandatory minimum term of imprisonment is provided by law for the violent crime. The court may impose this mandatory five-year sentence to run consecutively or concurrently.").

Major received a mandatory-minimum sentence which exceeded five years. Thus, he is not necessarily required to serve the no-parole, five-year sentence. If he is not required to serve it, then we question why it should prevent parole eligibility on an otherwise parolable offense.

**CHIEF JUSTICE TOAL:** Although I concur with the majority opinion, I write separately to address the dissent's interpretation of *State v. Atkins*, 303 S.C. 214, 399 S.E.2d 760 (1990). The dissent is correct to observe that we recognized in *Atkins* the logical impossibility of aggregating multiple life sentences. However, the dissent errs in failing to extend that logic to the present case. It is just as much a logical impossibility to aggregate multiple life sentences as it is to aggregate a life sentence with *any* other sentence. Moreover, the lesson from *Atkins* as applied to the present case is that there is no sentence greater than life. Whether aggregated to a five year sentence or a second life sentence, the ultimate time served remains the same. Accordingly, I believe *Atkins* controls the inquiry in the present case, and stands for the proposition that a life sentence may not be aggregated with another sentence so as to affect parole eligibility where statute does not so provide.

**JUSTICE PLEICONES:** I respectfully dissent. In my view, the sentence at issue here is unambiguous and not subject to interpretation. Where a trial judge imposes two sentences, only one of which is denominated "consecutive," it of necessity follows the other. Moreover, while I agree that a judicial officer is not empowered to determine whether parole will be granted, I fundamentally disagree with the suggestion that a judge cannot structure a sentence in such a way that the defendant is never eligible to be considered for parole. In order to find that the Legislature intended such a result where a defendant is convicted of both a violent offense and of using a weapon in the commission of that offense, one need look no further than S.C. Code Ann. § 16-23-490(B) (2003), which specifically authorizes the judge to make the five year weapons sentence consecutive.

In interpreting sentences, the Department looks to the sentences imposed, not to the statutes. Moreover, only if there is an ambiguity in the sentences, must the Department or the court ascertain the intent of the judge, not, as the majority suggests, the intent of the parties. Finally, while certain parole eligibility determinations are statutorily committed to the Department,[8] as is the decision whether to grant parole,[9] there is no authority for the statement that a judge violates the separation of powers doctrine when he structures a sentence so that an otherwise parole-eligible defendant will never receive a hearing before the Board. See cases collected in People v. Montgomery, 669 P.2d 1387 (Colo. 1983) (no separation of powers issue in sentence structuring).

Finally, I read Mims v. State, 273 S.C. 740, 259 S.E.2d 602 (1979) to hold that where a defendant receives consecutive sentences, they are to be "aggregated," i.e. added together, in order to determine the date upon which the defendant first becomes parole eligible. In State v. Atkins, 303 S.C. 214, 399 S.E.2d 760 (1990), the Court simply

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[8] E.g., whether multiple violent offenses are part of a continuous course of conduct. S.C. Code Ann. § 24-21-640 (2003); State v. McKay, 300 S.C. 113, 386 S.E.2d 623 (1984).

[9] S.C. Code Ann. § 24-21-30 (2003).

recognized the logical impossibility of aggregating multiple life sentences. Here, we are asked to aggregate a life sentence and a consecutive five year sentence, a sentence which the General Assembly specified could, in the sentencing judge's discretion, be made consecutive. The result is admittedly harsh,[10] and perhaps not desirable, however, it is not an unlawful sentence.

I would reverse the order of the ALC.

**KITTREDGE, J., concurs.**

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[10] Respondent committed murder in 1990, at which time the possible sentences for murder were death, life with twenty year parole eligibility, or life with thirty year eligibility where an aggravating circumstance is found but a death sentence not imposed. § 16-3-20 (Supp. 1990). He received a "twenty-year" life sentence. In the weapons statute, the General Assembly has specified that the five year weapons sentence "does not apply" in only three situations: where the defendant is sentenced to death or to life without the possibility of parole, § 16-23-490(A), or where a mandatory minimum sentence in excess of five years is required for the violent offense itself. § 16-23-490(B). A person convicted of murder under the current statute would not be subject to the five year weapons sentence since the three sentencing choices currently are death, life without the possibility of parole, or a mandatory minimum thirty year sentence. § 16-3-20(A). Respondent, however, is not subject to the "mandatory minimum" exemption.

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Lois King and Deloris Sims, on behalf of themselves and all others similarly situated, Appellants,

v.

American General Finance, Inc., Respondent.

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Appeal From Orangeburg County
James C. Williams, Jr., Circuit Court Judge

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Opinion No. 26710
Heard June 10, 2009 – Filed August 31, 2009

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**REVERSED AND REMANDED**

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C. Bradley Hutto, of Williams & Williams, of Orangeburg, Charles L. Dibble, of Dibble Law Offices, of Columbia, Daniel W. Williams, of Bedingfield & Williams, of Barnwell, Steven W. Hamm, C. Jo Anne Wessinger-Hill, and Jocelyn T. Newman, all of Richardson, Plowden & Robinson, of Columbia, T. Alexander Beard, of Beard Law Offices, of Mt. Pleasant, Thomas M. Fryar, of Columbia, for Appellants.

James Y. Becker and Sarah P. Spruill, both of Haynsworth, Sinkler, Boyd, of Columbia, T. Thomas Cottingham, III, of Winston & Strawn, of Charlotte, for Respondent.

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**JUSTICE KITTREDGE:** In this case, Lois King and Deloris Sims, on behalf of themselves and those similarly situated, brought an action against American General Finance alleging the loan company violated the attorney preference statute by failing to timely ascertain the borrower's preference for legal counsel. S.C. Code Ann. §37-10-102. The class was certified, and subsequently decertified by a different trial court. The individual actions brought by King and Sims continued, resulting in summary judgment for American General and a defense jury verdict respectively. King and Sims appeal the class decertification and the dispositions of their individual cases. We reverse the class decertification as well as the trial court's holdings in the individual cases. We remand this case to continue as a class action and allow the class action to once again envelop the individual cases.

## I.

In 1996, the Legislature amended section 37-10-102(a), the key statute in this case. Prior to the 1996 amendment, lenders, such as American General, were required to "ascertain the preference of the borrower as to the legal counsel that is employed to represent the debtor . . . and the credit application on the first page thereof must contain information as is necessary to ascertain these preferences of the borrower" when the loan was secured in whole or in part by real estate. S.C. Code Ann. §37-10-102(a) (Supp. 1995). Following the 1996 amendment, a lender must notify the borrower prior to closing of the borrower's attorney preference rights by including the information on or with the credit application or providing the borrower written notice “delivered or mailed no later than three business days after the application is received or prepared." S.C. Code Ann. §37-10-102(a) (2002). The 1996 amendment became effective on May 30, 1996. Act No. 355, 1996 S.C. Acts 2187.

Accordingly, both versions of section 37-10-102(a) require timely notice to the borrower of his or her attorney preference rights. King and Sims allege American General failed to make this notification and bring this action on behalf of themselves and those similarly situated. King and Sims allege this action implicates approximately five thousand loans. Notably, section 37-10-105 of the South Carolina Code was amended in 1997 to preclude class actions for subsequent violations of section 37-10-102. S.C. Code Ann. §37-10-105 (2002).

King and Sims, the class representatives, both closed their loans with American General in 1995. Individually, King sought a home improvement loan to be secured by her home; however, she eventually received a debt consolidation loan instead. Nevertheless, American General presented King with a federal disclosure statement, which read "[y]ou are giving a security interest in your Real Estate" and listed an address. King executed this document.

Undisputedly, Deloris Sims received a loan from American General secured by her real property; however, the document American General relied on was an undated attorney preference statement.

In 1996, King and Sims brought this action on behalf of themselves and those similarly situated. In 1998, Judge T. L. Hughston, Jr. denied American General's motion for summary judgment and certified the class. The court analyzed the proposed class under Rule 23(a), SCRCP, and found all the following elements satisfied: numerosity, commonality, typicality, adequacy of King and Sims as class representatives, and amount in controversy exceeded one hundred dollars per class member.

Importantly, when discussing typicality, the court stated:

> [American General] has asserted a "substantial compliance" argument based upon *Davis v. NationsCredit Fin. Serv. Corp.*, [326 S.C. 83,] 484 S.E.2d 471 (1997). This argument is misplaced. *Davis* dealt with an issue of form, not one of timing. In *Davis*, the plaintiff had received the required notice at the time of application as required by [s]ection 37-10-102, but the notice was on a separate sheet rather than on the first page of the application. Timing is a critical issue of informed disclosure. The definition proposed by [King and Sims] excludes those who received the form at the time of application. Failure to give the required notice in such a manner in which it can be effective is not substantial compliance. The bright-line test of [s]ection 37-10-105 addresses the company-wide procedures of [American General]. Therefore, the requirement of typicality is satisfied.

This understanding of *Davis* and the distinction between the timing element and the form are essential to our ruling today.

Further, in his order Judge Hughston stated:

> This Court therefore orders the certification of the proposed class consisting of all persons who, since July 1, 1982, have taken a loan from [American General] which was secured in whole or in part by a lien on real estate in South Carolina for personal, family, or household purposes, whether recorded or not, and
>
> > a. for whom the debt secured is: I) still outstanding, or ii) (sic) payment was made on the loan within three years of the date of the filing of this action on August 1, 1996, and

> b. for whom [American General] failed to ascertain the attorney or insurance preference of the borrower at the time of application in the manner required by S.C. Code Ann. §37-10-102.

American General petitioned this Court for Writ of Mandamus and Writ of Certiorari from Judge Hughston's order. This Court denied both petitions. Subsequently, this case was designated complex and assigned to Judge James C. Williams, Jr.

In 2001, Judge Williams decertified the class finding "there is no such thing as a typical plaintiff in this case" because the timing of when a loan attached to property differed among the borrowers. In a later ruling, the trial court granted summary judgment for American General in King's individual case, finding the loan King eventually received was not secured by real property.

Additionally, the trial court granted partial summary judgment for Sims in her individual case, correctly noting "there can be no substantial compliance where the preferences are not ascertained until closing." Subsequently, the trial court granted American General's motion to reconsider the ruling for Sims, vacated its earlier ruling, and conducted a jury trial.

The jury found for American General. The jury was first asked, "[d]id the actions of American General in this case give a clear and prominent disclosure of the information necessary to ascertain the relevant preference of Deloris Sims? In other words, did American General substantially comply with the statutory requirements?" The jury answered "yes." In the second question the jury was asked to answer the critical question in the case—when was the disclosure made. Eleven of the jurors found American General made the disclosure on the day of the closing, and one juror found American General made the disclosure prior to the closing. Judgment was entered for American General.

This appeal of the decertification and treatment of King's and Sims's individual cases followed.

## II.

King and Sims argue the trial court erred in decertifying the class. We agree.

It is within a trial court's discretion whether a class should be certified. *Tilley v. Pacesetter Corp.*, 333 S.C. 33, 42, 508 S.E.2d 16, 21 (1998). Additionally, "[a] court may not look to the merits when determining whether to certify a class." *Id*. at 43, 508 S.E.2d at 21.

As discussed above, prior to 1996, section 37-10-102 read:

> Whenever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for a personal, family or household purpose –
>
> (a) *The creditor must ascertain the preference of the borrower* as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction and except in the case of a loan on property that is subject to the South Carolina Horizontal Property Act (§ 27-31-10 et seq.) the insurance agent to furnish required hazard and flood property insurance in connection with the mortgage and comply with such preference, and the credit application on the first page thereof must contain information as is necessary to ascertain these preferences of the borrower. The creditor may require that the attorney or agent so chosen be able to provide reasonable security to the creditor by way of mortgage title insurance in a company acceptable to the creditor and other insurance in a company acceptable to the creditor. If title insurance is made a condition of the loan at any point during the negotiations, it must remain a condition all the time thereafter regardless of which attorney ultimately closes the transaction. Any legal fees other than for

> examination and certification of the title, the preparation of all required documents, and the closing of the transaction required or incurred by the creditor in connection with the transaction is the responsibility of the creditor regardless of which party pays for the title work, document preparation, and closing.

(emphasis added). This Court interpreted section 37-10-102 in *Davis v. NationsCredit Financial Services Corp.*, 326 S.C. 83, 484 S.E.2d 471 (1997).

In *Davis*, this Court answered certified questions arising from a mortgage loan transaction where Davis received an attorney and hazard insurance preference statement on a separate sheet of paper contemporaneously with her credit application. 326 S.C. at 84, 484 S.E.2d at 471. Therefore, the issue in *Davis* was one of form: whether the presentation of the attorney preference disclosure on a separate paper from the application violated section 37-10-102.

In answering those questions, we construed the legislative purpose of section 37-10-102 to be "to protect borrowers." *Id*. at 86, 484 S.E.2d at 472. This Court then held, although the lender may technically deviate from section 37-10-102 by assessing the borrower's preference for legal counsel on a separate piece of paper administered contemporaneously with the actual application, the lender substantially complied with section 37-10-102 when the borrower received "clear and prominent disclosure of the statutorily required information." *Id*. Thus, this Court held substantial compliance may be achieved if the form of the disclosure is clear and meaningful.

The timing of the attorney preference disclosure was not an issue in *Davis*, as the lender provided the attorney preference statement contemporaneously with the loan application. Timing is the central issue in this case. As plainly defined in *Davis*, a clear, meaningful disclosure is a separate element from the timing requirement. The substance of the disclosure may be achieved through substantial compliance. The *Davis* concept of substantial compliance does not neatly fit the timing element of the attorney preference disclosure.

The notion of substantial compliance may have a limited application concerning the timing requirement in section 37-10-102 as written prior to the 1996 amendment, but only when the attorney preference disclosure is provided sufficiently prior to closing to allow the borrower to make an informed and meaningful decision. It was legal error to equate the *Davis* concept of substantial compliance concerning the form of the disclosure with statutory compliance concerning the *timing* of the disclosure.

To permit a construction of section 37-10-102 as sanctioning the lender's furnishing of the attorney preference disclosure at the closing would render the manifest legislative purpose a nullity.[1] The purpose of section 37-10-102 is "to protect borrowers." *Davis*, 326 S.C. at 86, 484 S.E.2d at 472; *see also McClanahan v. Richland County Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002) ("All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute."). Disclosure at closing that a borrower can employ a closing attorney of his or her preference is nonsensical.

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[1] As noted, section 37-10-102 was amended on May 30, 1996. Notably, the amendment affects causes of action accruing on or after May 30, 1996. Act No. 355, 1996 S.C. Acts 2187. The amended statute requires, "[t]he creditor must ascertain *prior to closing* the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction." (emphasis added). The amended statute alerts creditors they may comply by including preference information on the application or mailing or delivering written notice of the preference information no later than three business days after the preparation or receipt of an application. While the pre-1996 version of section 37-10-102 lacks an express timing provision, we hold the Legislature intended for the attorney preference disclosure to be made sufficiently in advance of the closing to provide a borrower a meaningful opportunity to select an attorney of his or her choice.

The trial court correctly observed the varying times in the loan process during which the attorney preference disclosure was made. But this timing differential does not impact Rule 23's typicality requirement, for typicality is found in the common feature of the lender delaying the attorney preference disclosure such that the borrower is denied any meaningful opportunity to select an attorney of his or her choice. In decertifying the class, we hold the trial court committed legal error. Accordingly, we reverse the class decertification. The class shall be deemed certified as of July 2, 1998, without interruption.

## III.

We turn to Sims's individual case, which involved a signed but undated attorney preference disclosure form. Sims argues the trial court erred in again merging the principle of substantial compliance with the timing element of section 37-10-102. We agree.

As discussed above, the trial court impermissibly entangled the concept of timeliness and substantial compliance so as to permit a finding of substantial compliance when the attorney preference disclosure is made at closing. As a matter of law, providing the attorney preference disclosure on the day of closing comes too late. This prejudicial error is clear in the inconsistent jury verdict forms.

In the first form, the jury unanimously held American General substantially complied with the statutory requirements. However, in the second form, eleven jurors found American General provided the attorney preference disclosure on the day of Sims's closing while one juror found the disclosure was made prior to the closing. Accordingly, we reverse due to the trial court's error of law imposing substantial compliance on the timing element in section 37-10-102.

## IV.

King argues the trial court erred in granting American General summary judgment on the basis that her loan was not secured by real property. We agree.

"Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." *Cafe Assoc., Ltd. v. Gerngross*, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991).

King entered into a loan transaction with American General on December 26, 1995. As part of the American General loan application, King executed a federal disclosure statement, which read "[y]ou are giving a security interest in your Real Estate" and then listed an address. Construing the facts in a light most favorable to King, this language created a security interest in King's property in favor of American General. *Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994) ("In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party."). There is nothing in the record to indicate American General returned this document to King or otherwise took steps to nullify the grant of the security interest.

We recognize that Gail Laney, the manager of deeds in the county where King's home is located, stated in her affidavit no mortgage is recorded for King's property in the land records office; however, the absence of recording affects priority among creditors, not the existence of a lien. *Epps v. McCallum Realty Co.*, 139 S.C. 481, 497, 138 S.E. 297, 302 (1927) (holding as to the two parties involved in making an instrument, recording is not necessary for the instrument to be valid). The executed document granting American General a lien on King's property remains notwithstanding the lack of recordation.

Due to the execution and retention of the security interest, we hold a genuine dispute of fact exists, precluding summary judgment. We reverse the grant of summary judgment.

**V.**

King and Sims make additional arguments we decline to reach due to our above holdings. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not discuss remaining issues when disposition of prior issue is dispositive).

We reverse the trial court's rulings regarding King's and Sims's individual claims and the decertification of the class. We remand the case to proceed as a class action effective as of the date of Judge Hughston's original order to certify the class filed on July 2, 1998.

**REVERSED AND REMANDED.**

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

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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The State, Respondent,

v.

Jason Sinatra Edwards, Maceo Latonya Edwards and Jonais Edwards, Petitioners.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Appeal from Williamsburg County
Howard P. King, Circuit Court Judge

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Opinion No. 26711
Heard June 11, 2009 – Filed August 31, 2009

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**REVERSED**

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Steven S. McKenzie, of Coffee, Chandler & Kent, of Manning, for Petitioners.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney

General William Edgar Salter, III, all of Columbia; and Solicitor Cecil Kelly Jackson, of Sumter, for Respondent.

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**CHIEF JUSTICE TOAL:** In this case, Petitioners, who were tried jointly, appeal their criminal convictions on the grounds that the trial court erred in quashing the first jury panel based upon a violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). The court of appeals affirmed the trial court, and Petitioners filed a writ of certiorari asking this Court to review and reverse the court of appeals decision.

## FACTUAL/PROCEDURAL BACKGROUND

Petitioners Jason, Maceo, and Jonais Edwards, all brothers, were tried jointly for the murders of Joe Woods and Jimmy Robinson in January 2006. During jury selection, the trial court was not able to impanel an entire twelve member jury because it ran out of venire persons during the selection process. During the selection process, Petitioners had used sixteen of a possible twenty preemptory strikes to strike nine Caucasian and seven African American potential jurors. The State made a *Batson* motion on the grounds that Petitioner's strikes were racially motivated, and the trial court heard the motion, despite the fact that a full jury was not yet impaneled. The trial court granted the State's *Batson* motion, holding that jurors 19, 50, and 131 were struck on racially cognizable grounds. The trial court quashed the first jury, and a new jury was selected. Jurors 50 and 131 were selected for the second jury, and the case proceeded to trial.

The jury found Petitioners Jason and Maceo Edwards guilty of murder and found Petitioner Jonais Edwards guilty of accessory after the fact of murder. Petitioners appealed their convictions and sentences, and the court of appeals affirmed. *State v. Edwards*, 374 S.C. 543, 649 S.E.2d 112 (Ct. App. 2007). This Court granted Petitioners' petition for a writ of certiorari to review the following question:

Did the trial court err in quashing the first jury panel based upon a violation of *Batson v. Kentucky*, 476 U.S. 79 (1986)?

## STANDARD OF REVIEW

In criminal cases, this Court will review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). This Court is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Quattlebaum*, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). On review, this Court is limited to determining whether the trial court abused its discretion. *State v. Rochester*, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990). This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence. *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001).

## LAW/ANALYSIS

Petitioners assert that the court of appeals erred in upholding the trial court's decision to grant the State's *Batson* motion. We agree.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venire person on the basis of race or gender. *State v. Hicks*, 330 S.C. 207, 211, 499 S.E.2d 209, 211 (1998). When one party strikes a member of a cognizable racial group or gender, the trial court must hold a *Batson* hearing if the opposing party requests one. *See State v. Haigler*, 334 S.C. 623, 629-30, 515 S.E.2d 88, 90-91 (1999) (explaining the proper procedure for a *Batson* hearing). The proponent of the strike must offer a race or gender neutral explanation. *Id.* The opponent must show the race or gender neutral explanation was mere pretext, which is generally established by showing the party did not strike a similarly situated member of another race or gender. *Id.* Under some circumstances, the explanation given by the proponent may be so fundamentally implausible the trial judge may determine the explanation was mere pretext, even without a showing of disparate treatment. *Id.*

Whether a *Batson* violation has occurred must be determined by examining the totality of the facts and circumstances in the record. *Riddle v. State*, 314 S.C. 1, 14, 443 S.E.2d 557, 565 (1994). The opponent of the strike carries the ultimate burden of persuading the trial court that the challenged party exercised strikes in a discriminatory manner. *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996). Appellate courts give the trial judge's finding great deference on appeal and review the trial judge's ruling with a clearly erroneous standard. *State v. Dyar*, 317 S.C. 77, 79, 452 S.E.2d 603, 604 (1994).

The trial judge's findings of purposeful discrimination rest largely on his evaluation of demeanor and credibility. *Sumpter v. State*, 312 S.C. 221, 224, 439 S.E.2d 842, 844 (1994). Often the demeanor of the challenged attorney will be the best and only evidence of discrimination, and an "evaluation of the [attorney's] mind lies peculiarly within a trial judge's province." *Hernandez v. New York*, 500 U.S. 352, 365 (1991). Furthermore, a strike must be examined in light of the circumstances under which it is exercised, including an examination of the explanations offered for other strikes. *State v. Oglesby*, 298 S.C. 279, 280, 379 S.E.2d 891, 892 (1989).

If a trial court improperly grants the State's *Batson* motion, but none of the disputed jurors serve on the jury, any error in improperly quashing the jury is harmless because a defendant is not entitled to the jury of her choice. *State v. Rayfield*, 369 S.C. 106, 114, 631 S.E.2d 244, 248 (2006). However, if one of the disputed jurors is seated on the jury, then the erroneous *Batson* ruling has tainted the jury and prejudice is presumed in such cases "because there is no way to determine with any degree of certainty whether a defendant's right to a fair trial by an impartial jury was abridged." *Id.* at 114, 631 S.E.2d at 248. The proper remedy in such cases is the granting of a new trial.

Petitioners challenged jurors 50 and 131 during the first jury selection.[1] Following the trial court's quashing of the first jury, Petitioners were not allowed to strike these jurors from the second jury and jurors 50 and 131 were impaneled for Petitioners' trial.

Petitioners initially challenged juror 50 on the grounds that he was a newspaper editor and might have knowledge of or have written a story about the case. Petitioners challenged juror 131 on the grounds that she worked for the Department of Motor Vehicles (DMV) and interacted with law enforcement on a regular basis.

The State argued in its *Batson* motion that both explanations were pretext for racial prejudice on the grounds that there was no evidence that juror 50 ever wrote an article about the case and that striking all DMV employees was so broad as to be evidence of pretext. The trial court ruled that the explanations given for jurors 50 and 131 were not racially neutral, but the court did not specifically articulate its reasoning. The court of appeals upheld the trial court, finding that "the record contains sufficient justification to conclude there was no abuse of discretion."

We find that the explanations given for jurors 50 and 131 were race neutral and that the trial court committed clear error in granting the State's *Batson* motion. Employment is a well-understood and recognized consideration in the exercise of peremptory challenges. *State v. Williams*, 379 S.C. 399, 402-03, 665 S.E.2d 228, 230 (Ct. App. 2008); *State v. Ford*, 334 S.C. 59, 65, 512 S.E.2d 500, 504 (1999) (holding place of employment is a race-neutral reason for a strike); *State v. Adams*, 322 S.C. 114, 125, 470 S.E.2d 366, 372 (1996) (finding type of employment is a race-neutral reason for a strike). Petitioners' stated concerns that juror 50 was a journalist and juror 131 was a state employee who interacted regularly with law enforcement are race neutral reasons to strike. The State bore the burden of demonstrating that these proffered explanations were pretext for racial

[1] Although Petitioners' strike of juror 19 was also found to be discriminatory, Petitioners have not raised that issue in this appeal.

discrimination. We find no evidence that the State met this burden and the trial court clearly erred in finding otherwise.

## CONCLUSION

For the forgoing reasons, we reverse the opinion of the court of appeals and remand for a new trial.

**WALLER, PLEICONES, KITTREDGE, JJ., and Acting Justice James E. Moore, concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Robert William Metts, Petitioner,

v.

Judy Mims, Berkeley Independent Publishing Company, Inc. d/b/a The Berkeley Independent and Summerville Communications, Inc. d/b/a The Goose Creek Gazette, Defendants,

Of Which Berkeley Independent Publishing Company, Inc. d/b/a The Berkeley Independent and Summerville Communications, Inc. d/b/a The Goose Creek Gazette are the Respondents.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Appeal From Berkeley County
R. Markley Dennis, Jr., Circuit Court Judge
Deadra L. Jefferson, Circuit Court Judge
Roger Young, Circuit Court Judge

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Opinion No. 26712
Heard October 8, 2008 – Filed August 31, 2009

**AFFIRMED IN PART; REVERSED IN PART; AND REMANDED**

E. Paul Gibson, of Charleston, and Stephen F. DeAntonio, of DeAntonio Law Firm, of Charleston, for Petitioner.

John J. Kerr, of Buist, Moore, Smythe & McGee, of Charleston, for Respondents.

**JUSTICE WALLER:** We granted certiorari to review the Court of Appeals' opinion in Metts v. Mims, 370 S.C. 529, 635 S.E.2d 640 (Ct. App. 2006). The Court of Appeals in Metts affirmed an order granting summary judgment to respondents (Newspapers), and therefore did not address the cross-appeals from the contempt order. We affirm petitioner's issues related to the discovery order, reverse the summary judgment decision, and remand back to the Court of Appeals for resolution of Newspapers' appeal regarding the contempt order.

## FACTUAL/PROCEDURAL BACKGROUND

Petitioner Robert William Metts is the Deputy County Supervisor of Berkeley County. On July 30, 2003, Newspapers each published a front-page article with the headline: "It was helpful, but was it legal?" The article discussed a controversial work policy instituted by County Supervisor Jim Rozier which allowed county employees to work on private property in competition with private businesses. In the story, defendant Judy Mims[1] was quoted as saying that county employees had been seen performing yard work on petitioner's private property.[2]

[1] Mims, who was a county councilwoman at the time, is now deceased.

[2] After the story was published, Mims called the reporter and denied having made the statement attributed to her about petitioner; one of the Newspapers

Petitioner sued Newspapers claiming that the statements in the article were defamatory because they suggested he was improperly benefiting from the services of county employees. According to petitioner, he had yard work performed by private companies and never utilized county employees. Petitioner further contended that defendant Mims fabricated the story because she had a "longstanding vendetta" against petitioner's supervisor, Rozier, who is an elected official.

During the discovery phase of the lawsuit, petitioner sought to obtain Newspapers' financial information for use in the punitive damages portion of trial. When Newspapers declined to provide the information, petitioner obtained an order compelling its production. Newspapers subsequently sought a contempt order to permit them to immediately appeal the discovery order. See, e.g., Tucker v. Honda of South Carolina Mfg., 354 S.C. 574, 577, 582 S.E.2d 405, 406-07 (2003) ("an order compelling discovery may be appealed only after the trial court holds a party in contempt"). The trial court issued the contempt order, but declined to impose any sanctions. Both petitioner and Newspapers filed appeals from the contempt order.

After the contempt order was issued, the trial court heard Newspapers' summary judgment motion. The trial court granted summary judgment in favor of Newspapers finding that petitioner failed to meet his burden of producing clear and convincing evidence that Newspapers acted with constitutional actual malice. See Fleming v. Rose, 350 S.C. 488, 567 S.E.2d 857 (2002) (libel plaintiff who is a public figure must produce clear and convincing evidence of actual malice in order to withstand defendant's summary judgment motion).

Petitioner timely appealed from the trial court's order granting summary judgment. The appeals from the trial court's orders were consolidated for review. The Court of Appeals affirmed the summary

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printed a correction. Petitioner alleges, however, that while the correction included his own denial of what was reported, it essentially reiterated the objectionable statement from Mims.

judgment order and further held that this affirmance mooted the cross-appeals from the contempt order. Metts, supra. We granted petitioner's request for a writ of certiorari.

## ISSUES

I. Did the Court of Appeals err in holding that the trial court had the authority to rule on Newspapers' summary judgment motion?

II. Did the Court of Appeals err in declining to address the merits of petitioner's appeal from the contempt order?

III. Did the Court of Appeals err in affirming the grant of summary judgment?

## DISCUSSION

### I.

Petitioner argues the trial court lacked jurisdiction to consider the summary judgment motion because he had filed an appeal from the contempt order **before** the order granting summary judgment was filed. Resolution of this argument requires a review of the following timeline of events:

> August 25, 2004: Judge Jefferson issues discovery order compelling Newspapers to provide the financial information sought by petitioner.
>
> December 22, 2004: Newspapers move for summary judgment.
>
> March 8, 2005: Judge Dennis hears contempt action filed by petitioner when Newspapers decline to comply with Judge Jefferson's August 2004 discovery order.

March 8, 2005: **Unsigned** Form 4 order is filed, finding Newspapers in contempt and holding summary judgment motion in abeyance. The form also states: "Formal order to follow."

April 7, 2005: The Berkeley Count Clerk of Court asks the parties to disregard/destroy the unsigned Form 4 order dated March 8, 2005. This memorandum indicates the request is "a follow-up to previous conversations."

April 28, 2005: Judge Dennis issues order on March contempt hearing, finding Newspapers in contempt, but imposing no sanctions. The trial court also states that Newspapers' summary judgment motion should be rescheduled for hearing but stays trial pending that hearing. This order was filed at 4:56 p.m. on April 29, 2005.

April 29, 2005: Judge Young hears Newspapers' summary judgment motion.

May 27/June 2, 2005: Newspapers and petitioner appeal Judge Dennis's order holding Newspapers in contempt but refusing to impose any sanctions.

June 20, 2005: Judge Young issues an order granting Newspapers summary judgment.

According to petitioner, the trial court lacked jurisdiction to consider the summary judgment motion because he had appealed Judge Dennis's contempt order on June 2, 2005, before Judge Young's order granting summary judgment was filed on June 20, 2005. We disagree.

Initially, we note that petitioner couches this argument as one involving the trial court's subject matter jurisdiction. Generally speaking, subject

matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong. E.g. Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994). Circuit courts have jurisdiction over general tort cases, such as the instant defamation case. See Sabb v. South Carolina State Univ., 350 S.C. 416, 422, 567 S.E.2d 231, 234 (2002). Accordingly, petitioner's "subject matter" jurisdiction claim is inapposite.

Petitioner also cites Rule 205, SCACR, in support of his argument. Pursuant to Rule 205, the service of a notice of appeal gives the appellate court **exclusive** jurisdiction over the appeal. Nonetheless, this rule also provides that a trial court may proceed "with matters not affected by the appeal." Here, the contempt order resulted from Newspapers' refusal to comply with a discovery order compelling it to provide financial data relevant to petitioner's punitive damages claim. Newspapers' motion for summary judgment, however, was on the merits of petitioner's libel claim. We find the summary judgment matter was unaffected by the appeal of the contempt order. Cf. Grosshuesch v. Cramer, 377 S.C. 12, 31 n.7, 659 S.E.2d 112, 122 n.7 (2008) (where the Court noted that the trial court properly ruled on a second discovery matter involving a deposition after the parties had filed appeals from the trial court's first order because the first order dealt with the subject of initial discovery responses). The trial court's ruling on the constitutional actual malice issue was clearly unrelated to the discovery dispute involving the Newspapers' financial data. Thus, the trial court properly proceeded on the summary judgment motion, despite the pending appeal on the contempt order. Rule 205, SCACR.

Petitioner further contends that because Judge Dennis orally held the summary judgment motion in abeyance, and this was memorialized in the unsigned Form 4 order filed in March 2005, Judge Young was unauthorized to hold the summary judgment hearing on April 29, 2005. We disagree. The Form 4 order was not signed by the judge and it specifically indicated a formal order would follow. Therefore, this form order was not in any way final. See Culbertson v. Clemens, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996) (a decree leaving some further act to be done by the court is not final); see also Cheap-O's Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 605, 567 S.E.2d

514, 518 (Ct. App. 2002) (a form order is a final order only if the circuit court indicates that nothing else remains to be done after it is signed).

Finally, petitioner asserts that, as a matter of public policy, a party which has been held in contempt should not be heard by the court until the contempt has been resolved. We find this argument is unpreserved for appellate review. Although petitioner raised this argument at the summary judgment hearing, it was not addressed in the trial court's order. Petitioner then failed to include this issue in his motion for reconsideration. Accordingly, the argument is procedurally barred, and the Court of Appeals properly did not address it. E.g., Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("A party *must* file [a Rule 59(e)] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.") (emphasis in original).

**II.**

Petitioner maintains the Court of Appeals erred in failing to address his argument that Judge Dennis improperly declined to impose sanctions on Newspapers for its contempt. We disagree.

The Court of Appeals, having upheld the grant of summary judgment, declined to address the merits of the contempt cross-appeals citing Jarrell v. Petoseed Co., 331 S.C. 207, 209-10, 500 S.E.2d 793, 794 (Ct. App. 1998) ("Civil contempt proceedings designed to coerce compliance generally terminate along with the termination of the main action."). Regardless, where a party chooses to be held in contempt in order to immediately appeal a discovery order, it is within the discretion of the trial court to forego sanctions. E.g., Lindsay v. Lindsay, 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct. App. 1997) ("Even though a party is found to have violated a court order, the question of whether or not to impose sanctions remains a matter for the court's discretion."). Clearly, under the circumstances of the instant case, it was within Judge Dennis's discretion to not impose contempt sanctions on Newspapers.

## III.

Finally, petitioner argues the Court of Appeals erred in affirming the trial court's order granting summary judgment for Newspapers. Because we find there is an issue of fact regarding actual malice, we agree with petitioner that the Court of Appeals erred by upholding summary judgment.

A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. For summary judgment purposes, a court must view the facts in the light most favorable to the non-moving party. E.g., George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Because it is "a drastic remedy, summary judgment should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (citation and internal quotation marks omitted).

In addition to the common law elements of defamation, a public figure has the constitutional burden of proving that the defendant published the alleged defamatory material with "actual malice." Anderson v. Augusta Chronicle, 365 S.C. 589, 594-595, 619 S.E.2d 428, 431 (2005) (citing New York Times v. Sullivan, 376 U.S. 254, 269 (1964)). To establish "actual malice," the plaintiff must show the defendant published the defamatory material with the knowledge it was false or with reckless disregard of whether or not it was false. George v. Fabri, 345 S.C. at 451, 548 S.E.2d at 874 (citing New York Times, supra).

"[T]he reckless conduct contemplated by the New York Times standard is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." Id. at 456, 548 S.E.2d at 876. Instead, the actual malice standard "is a subjective one – there must be sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of ... probable falsity.'" Harte-Hanks Comm., Inc. v. Connaughton, 491 U.S. 657, 688 (1989) (citation omitted). Reckless

disregard "may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." St. Amant v. Thompson, 390 U.S. 727, 732 (1968). Moreover, while the failure to investigate without more will not support a finding of actual malice, "the purposeful avoidance of the truth is in a different category." Harte-Hanks Comm., Inc. v. Connaughton, 491 U.S. at 692.

Petitioner argues that the following evidence creates a genuine issue of fact regarding actual malice:

1. Before publishing the story, the reporter obtained from Berkeley County a list of people who had received the services from county employees pursuant to the controversial policy; petitioner's name was **not** on that list.

2. The reporter had time to change the story, but she did not.

3. The reporter did not attempt to contact petitioner for comment or verification.

4. The reporter did not ask Mims who had told Mims they observed county employees doing yard work at petitioner's property.

5. The reporter was aware that Mims and petitioner's boss, Rozier, had an adversarial relationship with one another.

Here, viewing the record in a light most favorable to petitioner, there was sufficient clear and convincing evidence to create an issue of fact on the question of actual malice. The reporter obtained information from Councilwoman Mims, who was known to be a political nemesis of petitioner's supervisor. Moreover, the information from Mims was directly contradicted by the list the reporter received because petitioner's name was not on the list of those getting yard services from county employees. This is direct evidence that called into question the accuracy of Mims' statements.

Therefore, the reporter arguably had reason to doubt Mims' veracity. St. Amant v. Thompson, supra (when there are obvious reasons to doubt the veracity of the informant or the accuracy of her reports, reckless disregard may be found); see also Stevens v. Sun Publ'g Co., 270 S.C. 65, 72, 240 S.E.2d 812, 815 (1978) (where the Court found that actual malice can be established when reporters "print articles on the basis of an admittedly unreliable source, without further verification"). Looking at the totality of the evidence, a jury could infer reckless conduct sufficient to meet the New York Times standard of actual malice.

Accordingly, we hold summary judgment was improper.

## CONCLUSION

The decision of the Court of Appeals on the issue of summary judgment is reversed, but on all other issues raised by petitioner, the Court of Appeals opinion is affirmed. Because Newspapers' original appeal from the contempt order is no longer moot, we remand the matter back to the Court of Appeals.

**AFFIRMED IN PART; REVERSED IN PART; AND REMANDED**.

**TOAL, C.J., BEATTY and KITTREDGE, JJ., concur. PLEICONES, J., concurring in part and dissenting in part in a separate opinion.**

**JUSTICE PLEICONES:** I concur in part and dissent in part. I agree with the majority that the circuit court had jurisdiction to rule on the summary judgment motion. I disagree, however, with the decision to reverse the Court of Appeals' decision which affirmed the circuit court's grant of summary judgment to Newspapers.

I find no evidence of actual malice here. Actual malice is not satisfied by a showing of ill will, nor is the recklessness of a libel defendant's conduct "measured by whether a reasonably prudent man would have published, or would have investigated before publishing." George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001) citing St. Amant v. Thompson, 390 U.S. 727, 731 (1968). Petitioner was required to, but did not, produce evidence that the Newspapers "entertained serious doubts as to the truth of" councilwoman Mims statement. See St. Amant v. Thompson, 390 U.S. at 731. Only where the plaintiff can show "an extreme departure from the standards of investigation and reporting ordinarily adhered to by reasonable publishers" can a public figure plaintiff withstand a motion for summary judgment on the issue of actual malice. Anderson v. Augusta Chronicle, *supra*. In my view, petitioner did not meet this burden here.

"The actual malice standard is premised on our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'" George v. Fabri, 345 S.C. at 456-457, 548 S.E.2d at 876, citing New York Times v. Sullivan, 376 U.S. 254, 270 (1964). Here, Newspapers published information about a county official, information given to them by another county official. That petitioner's name was not on a list provided by a different county official is not evidence that publishing the story was "an extreme departure from investigative standards" nor was there any evidence that Newspapers in fact harbored serious doubts about councilwoman Mims' story. Moreover, the reporter's knowledge of the political enmity between councilwoman Mims and petitioner, combined with her failure to further investigate Mims' statement before publishing it, is "patently insufficient" to prove actual malice. Elder v. Gaffney Ledger, 341 S.C. 108, 533 S.E.2d 899

(2000). Finally, the gist of the allegedly defamatory story, that county employees were seen performing yard work on petitioner's property, is not particularly inflammatory given that the county had in place a policy permitting this practice.

I would affirm the decision of the Court of Appeals.

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Jean McMurray Hill, Trustee of the Jean M. Hill Revocable Trust, Appellant,

v.

York County Natural Gas Authority, Respondent.

Thomas E. Fitz, Jr., Frances Fitz Gaines, John Gregory Fitz, and Joseph Daniel Fitz, II, Appellants,

v.

York County Natural Gas Authority, Respondent.

Thomas E. Fitz, Jr., Frances Fitz Gaines, John Gregory Fitz, and Joseph Daniel Fitz, II, Appellants,

v.

York County Natural Gas Authority, Respondent.

Madison C. Martin and Elizabeth Martin, Appellants,

v.

York County Natural Gas Authority, Respondent.

Irby Carlyle McGill, a/k/a Carlyle McGill, Appellant,

v.

York County Natural Gas Authority, Respondent.

Carlyle McGill, Appellant,

v.

York County Natural Gas Authority, Respondent.

Myrtle Petty, Appellant,

v.

York County Natural Gas Authority, Respondent.

Carlyle McGill, Appellant,

v.

York County Natural Gas Authority, Respondent.

Harry J. Callahan, Jr. and Beverly S. Callahan, Appellants,

v.

York County Natural Gas Authority, Respondent.

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

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Opinion No. 26713
Heard June 23, 2009 – Filed August 31, 2009

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**AFFIRMED**

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A. Camden Lewis and Ariail E. King, both of Lewis & Babcock, of Columbia, and Alford Haselden, of Haselden, Owen & Boloyan, of Clover, for Appellants.

W. Mark White and W. Chaplin Spencer, Jr., both of Spencer & Spencer, of Rock Hill, for Respondent.

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**PER CURIAM:** A group of York County landowners challenge the power of the York County Natural Gas Authority to condemn land to construct a natural gas transmission pipeline. The landowners appeal from the trial court's determination that the York County Natural Gas Authority has the statutory authority to condemn their property and construct the pipeline. We affirm.

In July 2006, the York County Natural Gas Authority commenced proceedings to condemn real property in York County for the purpose of constructing a natural gas transmission pipeline. Eleven of the affected property owners (Landowners) answered the notice of condemnation by

filing a complaint in August 2006 challenging the authority of the York County Natural Gas Authority to condemn their real property. The case went to trial under various causes of action, and the trial court found that the York County Natural Gas Authority had the authority to condemn Landowners' property.

## ISSUES

Landowners appeal, raising two issues for review:

1) "The evidence and statutory interpretation do not support the [trial] court's findings that Blacksburg is a new source and thus, that Respondent did not exceed its authority under the Enabling Act."

2) "The trial court erred in finding that the Notices of Condemnation based on incorrect statutory authority can be amended."

## DISCUSSION

### I.

The York County Natural Gas Authority (Authority) is a special purpose district and corporate entity created by Act No. 959 of 1954. In 1957, by Act No. 694, section 1 of the original Act was amended to read as follows:

> It shall be the function of the authority to purchase, lease, acquire, build, construct, maintain and operate natural gas distribution systems within the service area hereinafter defined and such transmission lines as may be necessary to transport natural gas to the distribution systems from the transmission lines to be constructed by [South] Carolina Pipeline Company *or other*

> *sources from which natural gas may now or hereafter become available . . . .*

Act No. 694, 1957 S.C. Acts 1427 (emphasis added). By Act No. 193, which became effective on June 12, 1995, the Act was amended in several respects, including expansion of the Authority's service area beyond York County. Section 1 of the Act was amended to read as follows:

> It is the function of the authority to purchase, lease, acquire, build, construct, maintain, and operate natural gas distribution systems within the service area defined in this act and such transmission lines as may be necessary to transport natural gas to the distribution systems from the transmission lines owned by South Carolina Pipeline Company *or other sources from which natural gas may become available after the effective date of this act.*

Act No. 193, 1995 S.C. Acts 1569 (emphasis added).

Because the outcome of this case turns on the meaning of the statutory term "other sources," we need not delve extensively into the detailed factual history prior to the 1995 Act, including the Authority's once exclusive reliance on the South Carolina Pipeline Company (SCPC) and the reasons that prompted a change in that relationship. We simply note the Authority joined with its sister special purpose districts in Lancaster and Chester counties to form a joint agency called Patriots Energy Group (PEG) pursuant to the Joint Agency Act.[1] The goal of PEG was to "enable these natural gas special purpose districts to jointly undertake the acquisition and construction of natural gas facilities."

Under the authority provided in the Joint Agency Act, PEG issued bonds to cover its acquisition and construction costs. One of PEG's construction projects was to integrate its transmission system with the Town of Blacksburg's natural gas system. Blacksburg is in Cherokee County.

[1] S.C. Code Ann. §§ 6-24-10 to -300 (Supp. 2008).

Blacksburg is connected to the Transcontinental Pipeline Corporation's interstate pipeline (the Transco pipeline).[2] Thus, linking in with Blacksburg's natural gas system would allow the Authority (and its sister authorities, all under the umbrella of PEG) to connect to the Transco pipeline.

Pursuant to this plan PEG and Blacksburg entered into a capacity sharing agreement. The agreement included upgrading five miles of Blacksburg's system from Blacksburg, eastward to the Town of Kings Creek. This upgrade, which has been completed, involved replacing the existing 6-inch distribution line with an 8-inch high-pressure steel transmission pipeline.

In order to link up with the pipeline at Kings Creek, the Authority began condemnation proceedings (the proceedings being challenged in this lawsuit) to acquire rights-of-way to lay down 42.2 miles of 12-inch steel transmission pipeline. The transmission pipeline will run from Kings Creek, eastward across York and Chester Counties.

Landowners challenge the Authority's power of eminent domain, contending the connection to the Blacksburg natural gas system and the Transco pipeline is not statutorily authorized. Specifically, Landowners rely on that part of Act 193 that restricts the Authority to "other sources from which natural gas may become available after the effective date of this act." The Act became law on June 12, 1995. Because the Transco pipeline existed prior to June 1995, Landowners contend the Authority lacks statutory authorization to connect to the Transco pipeline and thus may not condemn their property.

The trial court did not read "other sources" so narrowly. The trial court noted that, "[t]he Act references the pre-1995 sources as 'the transmission lines owned by South Carolina Pipeline Company.' The source is not the South Carolina Pipeline Company, but rather its transmission lines."

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[2] The Transco pipeline is one of the primary pipelines providing natural gas to our state. It originates in the Gulf of Mexico and runs through the Southeast then up into New England.

In discerning legislative intent, "[a]ll rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *McClanahan v. Richland County Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002). "[W]ords in a statute must be construed in context. . . . [T]he meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute." *S. Mut. Church Ins. Co. v. S.C. Windstorm & Hail Underwriting Ass'n*, 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991) (internal citations omitted). "The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

Beginning with the premise that a source means transmission lines, the trial court went on to note that prior to the upgrade of the 5-mile pipeline from Blacksburg to Kings Creek, the 5-mile pipeline was a distribution line. After the upgrade, the pipeline became a transmission line. The trial court noted "[t]he evidence demonstrates that the Town of Blacksburg was not an available source for transportation capacity to [the Authority] prior to June 12, 1995. After the 1995 Act, the Town of Blacksburg upgraded and expanded its system." Therefore, the trial court found "[t]he upgrade of the existing distribution line to a high pressure transmission line provides the Town of Blacksburg with the capacity to transport gas to [the Authority's] system. Accordingly, the Town of Blacksburg became an available source within the meaning of the 1995 Act upon completion of the upgraded line."

The Authority takes no issue with the temporal limitation imposed by Act 193. The Authority responds that "Blacksburg's system was not capable of providing PEG or [the Authority] with transportation services prior to 1995. The construction upgrades from a distribution line did not even occur until 2004 or 2005."

When construing Act 193 in its entirety, we are persuaded the result reached by the circuit court is the correct one. We believe the Legislature did

not intend "other sources" in the restrictive manner urged by Landowners. We first recognize the Legislature stated that "[i]t is the intent of this legislation to provide a means of ensuring that reasonably priced natural gas service is available to all citizens who desire the service within the service area of the authority." Act No. 193 at 1574. We next recognize, as did the trial court, the phrase immediately preceding "other sources" grants to the Authority the power to construct and operate "natural gas distribution systems . . . from the *transmission lines* owned by South Carolina Pipeline Company." Act No. 193 at 1569 (emphasis added). We construe "other sources" as referring to transmission lines, consistent with the trial court's interpretation.

The balance of Act 193 supports this interpretation. For example, section 2 provides the following:

> The service area of the authority includes all of York County and each municipality within the county, all the Town of Smyrna to include that portion of the town which is within the boundaries of Cherokee County, and that portion of Cherokee County beginning at the intersection of the Broad River, the York County line, and the Cherokee County lines; extending in a northwesterly direction along the center line of the Broad River to the center of the Transcontinental Gas Pipeline Corporation's [Transco's] right-of-way; thence in a northeasterly direction along the center line of the Transcontinental Gas Pipeline Corporation's right-of-way to its intersection with the North Carolina state line; thence east along the common boundary of North Carolina and Cherokee County to the York County line.

Act No. 193 at 1569-70.

The Act further provides:

> Those areas in Cherokee County, which may now or in the future be served by the Blacksburg municipal system, must be excluded

> from the [A]uthority's distribution system, *but may be served by its transmission system*.
>
> (B) The Town of Blacksburg owns and operates a gas system which is capable of providing gas service to the portion of the service area of the [A]uthority in Cherokee County except for the portion located in the Town of Smyrna. The town is responsible for the distribution of gas to end users located in such service area and may supply this gas service either through its transmission lines and distribution lines *or by connecting its distribution lines to the transmission lines of the [A]uthority* upon the payment of a reasonable tap fee and a reasonable transportation charge to the [A]uthority for the use of its transmission lines.

Act No. 193 at 1570 (emphasis added).

The Authority and Blacksburg have acted in accordance with this statutory authorization.

The interpretation advanced by the Landowners would create an irreconcilable conflict in the Act. Consequently, we construe the term "other sources" in a manner that reconciles and harmonizes the language with other provisions of the Act. *See Hitachi Data*, 309 S.C. at 178, 420 S.E.2d at 846 ("The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose."); *see also S. Mut. Church Ins.*, 305 S.C. at 342, 412 S.E.2d at 379 (noting that the "Court may not, in order to give [e]ffect to particular words, virtually destroy the meaning of the entire context; that is, give the particular words a significance which would be clearly repugnant to the statute, looked at as a whole, and destructive of its obvious intent"). This result further gives efficacy to the Joint Agency Act. Because Blacksburg's system was not capable of providing PEG (or the Authority) with transportation services prior to June 1995, the post-June 1995 addition of the transmission pipeline from Blacksburg to Kings Creek made the Blacksburg system an available source

under the Act. In view of the statutory authorization, the Authority is empowered to condemn the subject properties.

## II.

Landowners' final challenge concerns the trial court's failure to dismiss the condemnation proceedings based on the incorrect statutory authority referenced in the original condemnation notices. The trial court ruled that the Authority's "failure to cite the proper statutory authority in the Notice of Condemnation may be appropriately redressed by an amendment to the notice." We observe that no party was prejudiced by the reference to the incorrect statutory reference, for all parties were well aware of the central dispute concerning legislative intent in Act 193. Moreover, Landowners concede that under Act 193 the Authority has the power to condemn property. We affirm the trial court pursuant to Rule 220(b)(1), SCACR.

## CONCLUSION

For the reasons stated, the judgment of the trial court is

**AFFIRMED.**

**TOAL, C.J., WALLER, BEATTY, KITTREDGE, JJ., and Acting Justice James E. Moore, concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Charlean L. Eason, Appellant/Respondent,

v.

Fredrick W. Eason, Respondent/Appellant.

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Appeal From Greenville County
William J. Wylie, Jr., Family Court Judge

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Opinion No. 26714
Heard June 24, 2009 – Filed August 31, 2009

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**AFFIRMED IN PART; REVERSED IN PART; REMANDED**

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Kenneth C. Porter, of Porter & Rosenfeld, of Greenville, for Appellant-Respondent.

J. Falkner Wilkes, of Greenville, for Respondent-Appellant.

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**JUSTICE WALLER:** This is a cross-appeal from the family court's order which granted appellant/respondent Charlean L. Eason ("Wife") and respondent/appellant Fredrick W. Eason ("Husband") a divorce based on one year's continuous separation. We reverse in part and remand on Wife's

appeal. As to Husband's appeal, we affirm pursuant to Rule 220(b)(1), SCACR.

## FACTS

The parties married on November 29, 1973 and separated on October 26, 2003.[1] On October 31, 2003, Wife filed a complaint in family court seeking legal separation and alimony ("the 2003 Action"). Husband filed an answer and counterclaim in the 2003 Action.

Mediation for the 2003 Action was conducted in September 2004, and a number of issues were settled. In the written mediation agreement, the parties each reserved "the right to seek alimony from the other until such time as [Wife] is fully employed with benefits,[2] at which time this reservation will terminate."

A few months later, the parties signed a written agreement ("the Agreement") which had been prepared by Husband's lawyer and stated the following:

> Both parties agree that they will not seek a divorce on the grounds of adultery; they will proceed with divorce on the grounds of living separate and apart in excess of one year. **The parties also agree that neither party will use adultery as a bar to alimony.**

[1] The parties have one son who was over 18 and attending college at the time the parties separated.

[2] Wife received her associate's degree in nursing in 1987 and became a licensed registered nurse in 1988. From that time until 2001, she worked full time as a nurse at Greenville Memorial hospital. Wife stopped working due to depression. She briefly returned to nursing in 2004, but left the job after a few months when she had a breakdown and was hospitalized for depression.

> Further, both parties agree to be equally responsible for college tuition and costs for their son.

(Emphasis added). The Agreement referenced the case number associated with the 2003 Action. Husband signed this document on December 29, 2004, and Wife signed on January 7, 2005.

Also on January 7, 2005, Wife filed a divorce complaint ("the 2005 Action").[3] The 2005 Action sought a divorce based on continuous separation for one year. Wife requested alimony, both *pendente lite* and permanently, as well as attorney's fees. Husband promptly filed an answer and counterclaim, also requesting a divorce based on continuous separation for one year. The family court issued a temporary order awarding Wife spousal support in the amount of $1,236.00 per month, which represented one third of Husband's gross pay at the time.

Over one year later, however, Husband filed a motion to amend his answer. Husband's amended answer and counterclaim requested a divorce on the ground of adultery and also alleged that Wife was in a relationship "tantamount to marriage." Husband claimed Wife should be denied alimony. The family court granted his motion to amend.

In March 2007, the family court held a final hearing. At the hearing, the parties admitted the mediation agreement from the 2003 Action, stating that all issues had been resolved except for alimony and attorney's fees with respect to the 2005 Action.[4] The family court approved the mediation agreement, and it was incorporated into the final order.

Wife testified that she no longer works as a nurse due to her depression.[5] Her treating psychiatrist testified by deposition that Wife has major depression, an anxiety disorder, and bipolar disorder. In his opinion,

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[3] The 2003 Action had been administratively dismissed.

[4] In the mediation agreement, Husband agreed to pay Wife's attorney's fees of $3,000.

[5] See fn. 2, supra.

Wife is medically unable to work. In February 2007, Wife applied for Social Security disability benefits. According to her financial declaration, her only income is the temporary alimony from Husband. Husband testified that he has worked for the railroad for 34 years. According to his financial declaration, he earns $3,600.00 per month.

Regarding the Agreement, Husband testified that he directed his attorney to prepare it. Husband further explained as follows:

> Me and [Wife] talked, and we were supposed to get a divorce like adults. I didn't want my children embarrassed by us going by adultery, knowing that their mama had adultery – committed adultery and I had adultery. And I thought we was just going to get [the divorce] on the conclusion that we'll both go our separate ways. I didn't know I was signing a paper for her to be with a man. I didn't know I was giving her a license to cheat.

Husband acknowledged he was about to move in with his girlfriend when he signed the document.

According to Wife, Husband asked her to sign the Agreement because "he wanted to move in with his girlfriend, [and] he didn't want me to seek the divorce on the grounds of adultery. And because I had no problem with him doing that, I didn't mind signing the paper." Wife maintained she did not commit adultery prior to signing the paper, and would not have had sex with anyone but for the Agreement.

Husband attempted to establish that Wife was continuously living with her boyfriend, Calvin Moss.[6] Wife and Moss met in May 2004 and became

[6] See S.C. Code Ann. § 20-3-130(B) (Supp. 2008) (which provides that alimony terminates upon "the remarriage or continued cohabitation of the supported spouse"). This section also provides as follows:

> For purposes of this subsection and unless otherwise agreed to in writing by the parties, "continued cohabitation" means the supported

intimate in February 2005. In exchange for helping Wife maintain her three trailer properties and repair her cars, Moss lives in one of Wife's trailers without paying rent. Both Moss and Wife admitted that although they had lived together at times, they never cohabited for more than two through four weeks at a time. Moss testified they do not have any financial arrangements together. Both Moss and Wife testified that their relationship is not exclusive and they date other people. In addition, the parties' 27-year-old son ("Son") testified he had not witnessed his mother and Moss cohabiting for 90 continuous days.

Husband raised questions about Wife's decrease in utilities usage, such as water and gas, and introduced copies of the utilities bills to suggest that Wife was not actually living at the trailer she said she was. Wife, Son, and Moss testified that she turned off the utilities and used kerosene lamps in an attempt to save money.

The family court issued a written order barring Wife from receiving alimony because Husband established by clear and convincing evidence that Wife and Moss had been in an adulterous relationship since early 2005. Regarding Wife's argument that the Agreement estopped Husband from requesting alimony be denied, the family court found the Agreement was an unenforceable contract and in contravention of public policy. The family court specifically declined to rule on the statutory issue of whether Wife and Moss resided together for a period of 90 days or more. See S.C. Code Ann. § 20-3-130(B) (Supp. 2008). Finally, the family court ruled that the parties shall pay their own legal fees.

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> spouse resides with another person in a romantic relationship for a period of ninety or more consecutive days. The court may determine that a continued cohabitation exists if there is evidence that the supported spouse resides with another person in a romantic relationship for periods of less than ninety days and the two periodically separate in order to circumvent the ninety-day requirement.

Wife and Husband both appeal from the family court's order.

## ISSUES

### Wife's Appeal

1. Did the family court err in finding Wife was barred from receiving alimony when the parties agreed in writing that neither would use adultery as a bar to alimony?

2. Did the family court err in failing to award Wife attorney's fees?

### Husband's Appeal

Did the family court err in failing to terminate Wife's right to alimony based on continuous cohabitation with her boyfriend?

## STANDARD OF REVIEW

In appeals from the family court, the appellate court has jurisdiction to find facts in accordance with its view of the preponderance of the evidence. E.g., Strickland v. Strickland, 375 S.C. 76, 82, 650 S.E.2d 465, 469 (2007). However, this broad scope of review does not require this Court to disregard the findings of the family court. Wooten v. Wooten, 364 S.C. 532, 540, 615 S.E.2d 98, 102 (2005).

"Questions concerning alimony rest within the sound discretion of the family court judge whose conclusion will not be disturbed absent a showing of abuse of discretion." Degenhart v. Burriss, 360 S.C. 497, 500, 602 S.E.2d 96, 97 (Ct. App. 2004). An abuse of discretion occurs when the decision is controlled by some error of law or is based on findings of fact that are without evidentiary support. Id.

## DISCUSSION

### 1. Effect of the Agreement

Based on the doctrines of waiver and estoppel, Wife argues the Agreement should have been enforced to prevent Husband from asserting the bar on alimony based on adultery. We agree.

South Carolina statutory law provides that no alimony may be awarded to a spouse who commits adultery before either: (1) the formal signing of a written property or marital settlement agreement, or (2) the entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties. S.C. Code Ann. § 20-3-130(A).

"Waiver is a voluntary and intentional abandonment or relinquishment of a known right." Parker v. Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). Stated differently, waiver requires a party to have known of a right and known he was abandoning that right. Strickland, 375 S.C. at 85, 650 S.E.2d at 471. "Equitable estoppel occurs where a party is denied the right to plead or prove an otherwise important fact because of something which he has done or failed to do." Parker, 313 S.C. at 487, 443 S.E.2d 391. This Court has recognized that "the distinction between waiver and estoppel is close, and sometimes the doctrines merge into each other with almost imperceptible gradations." Id. (citation omitted); Strickland, supra.

We find the Agreement here constitutes a waiver of the right to use adultery as a bar to alimony. Clearly, Husband knew of this right as it was his lawyer who drew up the Agreement. Therefore, Husband intentionally abandoned this right. Strickland, supra. Moreover, Husband actively sought Wife's signature on the Agreement because he was about to move in with his girlfriend. Thus, the trial court erred in not finding Husband was equitably estopped from using Wife's subsequent adultery as a bar to alimony. See Parker, supra.

Husband argues that the Agreement contravenes public policy, and therefore, the family court correctly did not enforce the Agreement. See Berkebile v. Outen, 311 S.C. 50, 54 n.2, 426 S.E.2d 760, 762 n.2 (1993) ("The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution."). We disagree.

In our opinion, the Agreement was a mutual promise to not sue for divorce based on adultery, and to not raise adultery as a bar to alimony. In other words, the Agreement was not against public policy, it simply was a valid waiver. Hence, it must be enforced. See Degenhart v. Burriss, 360 S.C. at 501, 602 S.E.2d at 98 (the family court "must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully") (internal quote marks and citation omitted); cf. Maxwell v. Maxwell, 375 S.C. 182, 650 S.E.2d 680 (Ct. App. 2007) (upholding a written non-modifiable separation agreement which included alimony to the wife as well as a promise not to bring a divorce action based on adultery, even though the husband later discovered the wife had committed adultery before the agreement's execution); Croom v. Croom, 305 S.C. 158, 406 S.E.2d 381 (Ct. App. 1991) (upholding court-approved written settlement of the parties which included alimony to the wife and an agreement to not bring divorce action based on adultery despite the wife's subsequent cohabitation with her paramour).

Accordingly, we reverse the family court's ruling that the Agreement was unenforceable and remand the matter for a determination of the proper type and amount of alimony for Wife. See § 20-3-130(C) (enumerating factors to be considered when making an alimony award).

## 2. Attorney's Fees

Wife argues the family court erred by not awarding her attorney's fees.

An award of attorney's fees lies within the sound discretion of the family court and will not be disturbed absent an abuse of discretion. E.g., Patel v. Patel, 359 S.C. 515, 533, 599 S.E.2d 114, 123 (2004). In determining whether to award attorney's fees, the court should consider each party's ability to pay his or her own fees, the beneficial results obtained by counsel, the parties' respective financial conditions, and the effect of the fee on the parties' standard of living. E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992).

Given our disposition on Wife's first issue, the family court should reconsider Wife's request for attorney's fees on remand. See Semken v. Semken, 379 S.C. 71, 664 S.E.2d 493 (Ct. App. 2008) (where the family court's decision to terminate the husband's alimony obligation was reversed, the issue of attorney's fees was remanded for reconsideration).

## Husband's Appeal

Husband argues the family court erred by not finding Wife was barred from receiving alimony based on her continuous cohabitation with her boyfriend. We affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities: Strickland v. Strickland, 375 S.C. at 89, 650 S.E.2d at 472 (in order to bar alimony based on "continued cohabitation," it must be established that the supported spouse lives "under the same roof as the person with whom they are romantically involved for at least ninety consecutive days"); Semken v. Semken, 379 S.C. at 77, 664 S.E.2d at 497 (section 20-3-130 "requires the spouse and the paramour to actually 'live under the same roof' for ninety consecutive days, rather then merely claim the same residence for that time period").

## CONCLUSION

For the reasons discussed above, we reverse the family court's finding that Wife is barred from receiving alimony and remand to the family court for: (1) a determination of the appropriate alimony award; and (2) reconsideration of Wife's request for attorney's fees.

**AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.**

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

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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| Marilee B. Fairchild and Larry J. Fairchild, | Appellants/Respondents, |
| v. | |
| South Carolina Department of Transportation, William Leslie Palmer and Palmer Construction Co., Inc., | Defendants, |
| Of whom William Leslie Palmer and Palmer Construction Co., Inc, are | Respondents/Appellants. |

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Appeal From Colleton County
Perry M. Buckner, Circuit Court Judge

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Opinion No. 4611
Heard March 18, 2009 – Filed August 27, 2009

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**AFFIRMED IN PART, REVERSED IN PART, and REMANDED**

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Bert G. Utsey, III, of Walterboro, and George David Jebaily, of Florence, for Appellants/Respondents.

Kirby D. Shealy, III and Bradley L. Lanford, both of Columbia, for Respondents/Appellants.

**LOCKEMY, J.**: On appeal from this tort action, Marilee and Larry Fairchild[1] argue the trial court erred in (1) refusing to instruct the jury on certain charges; (2) directing a verdict on Fairchild's claim for punitive damages; and (3) denying their motion for a new trial. William Palmer and Palmer Construction cross-appeal and maintain the trial court erred in (1) failing to grant Palmer's motion for an independent medical examination of Fairchild and (2) granting Fairchild's motion for directed verdict as to the affirmative defense of comparative negligence. We affirm in part, reverse in part, and remand.

## FACTS

On March 1, 2001, Fairchild and Palmer were involved in an automobile accident in the inside, southbound lane of Interstate 95. James Rabb, a South Carolina Department of Transportation (SCDOT) employee, was also traveling southbound but began crossing over the median to head in the northerly direction. Rabb was driving a SCDOT dump truck with a trailer attached carrying a backhoe. While Rabb waited for the northbound traffic to clear, the trailer hitched to the dump truck protruded approximately halfway across the inside southbound lane in which Fairchild and Palmer were traveling.

Two cars traveling ahead of Fairchild simultaneously switched from the inside to the outside traffic lane. Fairchild, driving a minivan, then saw the backend of Rabb's trailer blocking her traffic lane. In response, Fairchild

[1] Marilee Fairchild's husband, Larry, was voluntarily dismissed as a party to the civil action prior to the commencement of trial. Therefore, for purposes of this opinion when we refer to Fairchild we reference Marilee Fairchild only.

"flashed" her brakes but did not slam on the brakes. Fairchild testified she had her foot on the brake as she continued to coast in order to stay ahead of the car behind her and not hit the trailer obstructing the road. Though Fairchild avoided colliding with Rabb's trailer, she did not avoid a collision with Palmer, who was traveling directly behind her.

Palmer, also driving a truck and hauling a trailer, braked in an attempt to avoid colliding with Fairchild. Palmer also swerved to the right but was unable to avoid hitting Fairchild's vehicle. The force of the impact caused Fairchild's minivan to flip and roll, ultimately coming to a rest in the median. Fairchild sustained injuries to her head, neck, and right shoulder as a result of the accident.

On February 26, 2003, Fairchild brought suit against SCDOT, Palmer, and Palmer Construction. In her complaint, Fairchild maintained Palmer was operating a vehicle owned by Palmer Construction when the accident occurred. Additionally, Fairchild asserted several negligence claims against the three defendants. Fairchild requested a jury trial and sought both actual and punitive damages. Ultimately, Fairchild entered into a covenant not to sue with SCDOT, and the Honorable Roger Young dismissed SCDOT as a party to the action.

During the trial, both sides presented evidence regarding what happened on the day of the accident, as well as medical evidence regarding Fairchild's injuries. Over the course of the trial, both sides also made several motions. Palmer moved for an independent medical exam pursuant to Rule 35(a), SCRE, and sought to have it performed by Dr. James Ballenger, a psychiatrist with whom Palmer had consulted as an expert witness. Ultimately, the trial court denied Palmer's request because Dr. Ballenger was listed as an expert witness for the defense. At the close of the evidence, the trial court directed a verdict for Fairchild on Palmer's affirmative defense of comparative negligence. Thereafter, Palmer renewed his motion for a directed verdict as to punitive damages, and the trial court granted the motion. The trial court also refused to charge the jury with several instructions requested by Fairchild.

At the conclusion of trial, the jury found in favor of Fairchild and awarded her $720,000 in damages.[2] After the jury published its verdict, Fairchild moved for a judgment notwithstanding the verdict, or, in the alternative, for a new trial nisi additur. The trial court denied all of Fairchild's post-trial motions. Both Palmer and Fairchild appeal.

## LAW/ANALYSIS

### I. Jury Instructions

Fairchild contends the trial court erred in refusing to instruct the jury on three requested charges. She maintains the charges were timely submitted to the trial court, and the charges would have assisted the jury in making an informed decision based on South Carolina law; thus, the charges rendered were inadequate. Palmer argues there were no allegations or evidence of the intervening negligence of third persons in this case. Therefore, the trial court did not err in refusing to instruct the jury on the charges. Finally, Palmer submits Fairchild cannot demonstrate the requisite error or prejudice to warrant reversal on this basis. We agree with Fairchild and find the trial court erred in refusing to instruct the jury on the requested charges.

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion." Cole v. Raut, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." Id. "A trial court must charge the current and correct law." Wells v. Halyard, 341 S.C. 234, 237, 533 S.E.2d 341, 343 (Ct. App. 2000). In reviewing a jury charge for alleged error, an appellate court must consider the charge as a whole in light of the evidence and issues presented at trial. Id. "Ordinarily, a trial [court] has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence." Fernanders v. Marks Constr. of S.C., Inc., 330 S.C. 470, 473, 499 S.E.2d 509, 510 (Ct. App. 1998). However, jury instructions should be confined to the issues made by the pleadings and supported by the evidence.

[2] The trial court reduced the jury's award to $715,000 after determining the award should be offset by $5,000 from a prior settlement.

Baker v. Weaver, 279 S.C. 479, 482, 309 S.E.2d 770, 771 (Ct. App. 1983). In Burns v. South Carolina Commission for Blind, 323 S.C. 77, 80, 448 S.E.2d 589, 591 (Ct. App. 1994) (internal citations omitted) this court held:

> If the requested charge states a sound principle of law that is applicable to the case, and not otherwise covered by the charge, refusal to charge it is error and requires a new trial. Moreover, when general instructions to the jury are insufficient to enable the jury to understand fully the law of the case and issues involved, a refusal to give a requested charge is reversible error.

To warrant reversal, the party seeking the requested jury charge must demonstrate error and prejudice. Cole v. Raut, 378 S.C. 398, 405, 663 S.E.2d 30, 33 (2008) ("An erroneous jury instruction, however, is not grounds for reversal unless the appellant can show prejudice from the erroneous instruction."). "An alleged error is harmless if the appellate court determines beyond a reasonable doubt that the alleged error did not contribute to the verdict." Wells, 341 S.C. at 237, 533 S.E.2d at 343.

In the present case, Fairchild requested the trial court submit the following charges to the jury:[3]

> Plaintiff's Request to Charge Number 11: Liability exists for the natural and probable consequences of negligent acts and omissions, proximately flowing there from. Intervening negligence of a third person will not excuse the original wrongdoer if such intervention ought to have been foreseen in the exercise of due care. Matthews v. Porter, 239 S.C. 620, 124 S.E.2d 321 (1962). It is the law in South Carolina that the negligence of a treating doctor is reasonably foreseeable. It is the general rule that if an injured person uses ordinary care in selecting a

[3] Jury instructions are written as they appear in the Record on Appeal.

> physician for treatment of his injury, the law regards the aggravation of the injury resulting from the negligent act of the doctor as part of the immediate and direct damages which naturally flow from the original injury. Bessinger v. Deloach, 230 S.C. 1, 94 S.E.2d 3 (1956); Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984).
>
> Plaintiff's Request to Charge Number 12: The intervening negligence of a third person will not excuse the original wrongdoer if such intervention ought to have been foreseen in the exercise of due care. Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (S.C. 1984). The negligence of an attending physician is reasonably foreseeable. Therefore, if an injured person uses ordinary care in selecting a physician for treatment of her injuries, the law regards the aggravation of the injury resulting from the negligent act of the physician as part of the immediate and direct damages which naturally flow from the original injury. Payton v. Kearse, 319 S.C. 188, 460 S.E.2d 220 (Ct.App. 1995).
>
> Plaintiff's Request to Charge Number 13: I CHARGE YOU THAT "if an injured person uses ordinary care in selecting a physician for treatment of his injury, the law regards the aggravation of the injury resulting from the negligent act of [or treatment by] the physician as a part of the immediate and direct damages which naturally flow from the original injury." Bessinger v. DeLoach, 94 S.E.2d 3, 5, (S.C. 1956).

In its ruling regarding the jury charge, the trial court stated it refused to charge the jury on the requests because there was no evidence of negligence by an attending physician. However, Fairchild made a compelling argument that the trial court should have instructed the jury on the requested charges.

Fairchild argues defense counsel stressed the side effects of the drugs Fairchild took and suggested she was overmedicated. Palmer seems to imply the overmedication, rather than Palmer's negligence, was the source of many of Fairchild's ailments. In support of his theory, Palmer called and questioned several doctors and nurses to discuss Fairchild's course of treatment. The following statement by opposing counsel made during closing arguments, in particular, was convincing that the charges were relevant: "So ask yourself, is it the chronic post-traumatic headache that is the disabling headache, or is it the medication over-use that is the disabling headache?" Therefore, we find Fairchild demonstrated error. Moreover, given the jury's verdict and the amount of damages at issue, we also find the trial court's refusal to instruct the jury could have impacted the jury's verdict, thereby proving prejudice. Accordingly, we find the trial court erred in failing to instruct the jury on Fairchild's requested charges.[4] Therefore, we reverse and remand.

## II. Punitive Damages

Fairchild maintains the trial court erred in directing a verdict in favor of Palmer on Fairchild's punitive damages claim because evidence presented a jury question as to whether Palmer was reckless. In support of her recklessness claim, Fairchild notes Palmer was driving a large commercial truck in heavy traffic when the accident occurred, but still maintained a speed of sixty-five to seventy miles per hour. Based on Palmer's conduct and his statutory violations, Fairchild maintains the jury should have been permitted to consider whether Palmer acted recklessly. We agree.

### A. Current South Carolina Precedent

When evidence presented at trial yields only one conclusion concerning liability, the trial court may properly grant a motion for directed verdict. See Ecclesiastes Prod. Ministries v. Outparcel Assocs., 374 S.C. 483, 490, 649

[4] Our ruling does not indicate the trial court was required to instruct the jury on all requested charges. Because of their similarity, such a charge could be repetitive. It is within the trial court's discretion to determine which charges are relevant given the evidence presented.

S.E.2d 494, 497 (Ct. App. 2007) (“A motion for directed verdict goes to the entire case and may be granted only when the evidence raises no issue for the jury as to liability.”). So long as no more than one inference is created from the evidence presented, a jury issue is not created, and the trial court is proper in directing a verdict. Huffines Co. v. Lockhart, 365 S.C. 178, 187, 617 S.E.2d 125, 129 (Ct. App. 2005) (holding when the evidence is susceptible of more than one reasonable inference, a jury issue is created and the court may not grant a directed verdict).

"A plaintiff is entitled to recover punitive damages if the act complained of is determined to be willful, wanton or reckless." Camp v. Components, Inc., 285 S.C. 443, 444, 330 S.E.2d 315, 316 (Ct. App. 1985). A jury may award punitive damages even "when the wrongdoer does not actually realize that he is invading the rights of another, provided the act is committed in such a manner that a person of ordinary prudence would say that it was a reckless disregard of another's rights." Id. (quoting Hicks v. McCandlish, 221 S.C. 410, 415-16, 70 S.E.2d 629, 631 (1952)).

Under current South Carolina precedent, negligence per se is evidence of recklessness requiring the trial court to submit the issue of punitive damages to the jury. Wise v. Broadway, 315 S.C. 273, 276, 433 S.E.2d 857, 859 (1993) ("The causative violation of a statute constitutes negligence per se and is evidence of recklessness and willfulness, requiring the submission of the issue of punitive damages to the jury."); Rhodes v. Lawrence, 279 S.C. 96, 97-98, 302 S.E.2d 343, 344 (1983) ("In these circumstances, a jury question as to punitive damages was clearly presented given the well settled rule that a showing of statutory violation can be evidence of recklessness and willfulness."); Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 314, 594 S.E.2d 867, 875 (Ct. App. 2004) ("A factual question as to punitive damages is presented when there is evidence of a statutory violation."). These cases limit their holdings to creating a jury question only and not recklessness per se. In that regard the Wise court held:

> Violation of a statute does not constitute recklessness, willfulness, and wantonness per se, but is some evidence that the defendant acted recklessly, willfully, and wantonly. It is always for the jury to

> determine whether a party has been reckless, willful, and wanton. However, it is not obligatory as a matter of law for the jury to make such a finding in every case of a statutory violation.

315 S.C. at 276-77, 433 S.E.2d at 859 (internal citations omitted). In Austin, this court upheld the Wise holding finding a jury question is created when evidence supports violation of a statute rather than recklessness per se. 358 S.C. at 314-15, 594 S.E.2d at 875-76.

Wise is factually similar to the present case. There, Broadway was following Wise at a distance of three to four car lengths and was driving a heavy duty pickup truck with a half-full 140-gallon fuel tank in the back. Wise, 315 S.C. at 275, 433 S.E.2d at 858. When Wise braked in preparation for a turn, Broadway, unable to bring his vehicle to a stop, hit Wise from behind. Id. at 275, 433 S.E.2d at 859. The trial court struck Wise's punitive damages request after stating it did not believe a simple statutory violation gave rise to a punitive damages charge. Id. at 276, 433 S.E.2d at 859. The supreme court found the trial court erred and remanded the case for a new trial. Id. at 277, 433 S.E.2d at 859.

This court ruled similarly in Austin, and affirmed a trial court's submission of a punitive damages claim to the jury. 358 S.C. at 320, 594 S.E.2d at 878. There, while merging onto U.S. 29, a tractor-trailer failed to yield to Austin's right of way. Id. at 304, 594 S.E.2d at 870. The truck struck Austin's vehicle, causing injuries. Id. This court found Specialty Transportation's agent violated certain statutes by failing to stop and yield to Austin's right of way which established negligence per se. Id. at 314, 594 S.E.2d at 875. Therefore, submission of punitive damages to the jury was affirmed.

### B. Cases Preceding Wise

As Palmer noted at oral argument and in his briefs, Wise did not specifically overrule Bell v. Atlantic Coast Line Railroad, 202 S.C. 160, 24 S.E.2d 177 (1943), and Cubbage v. Roos, 181 S.C. 188, 186 S.E. 794 (1936). Further, as then Associate Justice Toal noted in her dissenting opinion in

Wise: "Where only one reasonable inference can be deduced from the evidence, however, the question becomes one of law for the court, and the court can refuse to submit punitive damages to the jury, even though the letter of some statute has not been observed by the defendant." 315 S.C. at 281, 433 S.E.2d at 861-62 (Toal A.J., dissenting) (citing Bell, 202 S.C. 160, 24 S.E.2d 177 (1943)).

In Bell, the jury awarded both actual and punitive damages after Bell alleged Atlantic Coast failed to maintain a railroad crossing in a manner safe for public use as required by law. 202 S.C. at 163-65, 24 S.E.2d at 179. There, the trial court refused to direct a verdict on punitive damages and later refused to set aside the punitive damages award. Id. at 164-65, 24 S.E.2d at 179. On review, the Bell court found no testimony supported the allegations in Bell's complaint. Id. at 171, 24 S.E.2d at 182. In referencing Cubbage, the court stated: "[W]e do not think that the existence of these statutes is controlling of the question of punitive damages under the testimony herein, if indeed, such statutes had any bearing on any phase of the case." 202 S.C. at 173, 24 S.E.2d at 183. Additionally, the Bell court found: "It is not enough for a plaintiff to show that the defendant neglected a duty imposed by statute and that he would not have been injured if the duty had been performed." Id. at 174, 24 S.E.2d at 183 (citation omitted). Accordingly, the court found "the trial [court] erred in refusing to direct a verdict against punitive damages, and in submitting the question of punitive damages to the jury, and . . . in overruling the defendant's motion for a new trial with respect to punitive damages." 202 S.C. at 175, 24 S.E.2d at 184. Though dicta rather than a holding, we find language from Bell in conflict with later cases.

In Cubbage, the South Carolina Supreme Court affirmed the trial court's decision to grant a new trial after the jury rendered a verdict on both actual and punitive damages. 181 S.C. at 203, 186 S.E. at 795. There, the trial court believed it erred in submitting the issue of punitive damages to the jury even though evidence demonstrated Roos was driving over the posted speed limit when he hit a child crossing the street. Id. at 190, 186 S.E. at 795. After reviewing several cases, the Cubbage court found:

> This court has not held that the mere violation of the letter of a statute in and of itself requires the [trial

> court] to submit an issue of recklessness, willfulness, or wantonness where the evidence shows that the spirit of the statute was being complied with, and the only reasonable inference from all the testimony is that such violation of the statute did not in fact amount to a reckless, willful, or wanton act. . . . In no case called to our attention has the court held that the trial [court] is powerless to direct a verdict as to punitive damages, or more properly speaking, peremptorily instruct the jury that it cannot award punitive damages, even though the letter of some statute has not been observed. To so hold would overrule the well-recognized principle that if only one reasonable inference can be deduced from the evidence, it becomes a question of law for the court, and not a question of fact for the jury.

Id. at 195-96, 186 S.E. at 797. When read in conjunction with preceding cases like Bell and Cubbage, which are still in effect, the law is unclear. Although in conflict with Bell and Cubbage, principles from Wise, Rhodes, and Austin are controlling as the latest precedent, and until the South Carolina Supreme Court clarifies this issue, trial courts are bound to charge the jury on punitive damages when presented evidence of negligence per se.

In the present case, because evidence existed Palmer was negligent per se, we reverse the grant of Palmer's directed verdict motion on punitive damages. Specifically, evidence existed Palmer was following another vehicle too closely and speeding. Consequently, the jury could have found he violated sections 56-5-1930(a) and 56-5-1520(A) of the South Carolina Code (2006). Therefore, because we are bound by supreme court precedent, we find the trial court erred by granting Palmer's directed verdict motion because a finding of a statutory violation may be considered by the jury as evidence of recklessness. Accordingly, we remand and instruct the trial court to submit the issue of punitive damages to the jury. On remand, whether or not punitive damages are warranted will be left to the jury's determination.

## III. Motion for New Trial

Additionally, Fairchild argues the trial court erred in denying her motion for a new trial because the verdict was grossly inadequate based on the evidence. Specifically, Fairchild maintains the trial court should have vetoed the jury's verdict using the thirteenth juror doctrine. Alternatively, Fairchild maintains the trial court could have granted a new trial absolute on the inadequate verdict. Given our ruling on the jury instruction issue, we need not address this issue. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

## IV. Independent Medical Examination

Next, Palmer argues the trial court erred in denying his motion for an Independent Medical Examination (IME) of Fairchild. Specifically, Palmer contends Fairchild did not pose a reasonable objection to his selection of Dr. Ballenger to perform the IME.[5] We disagree.

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[5] Fairchild argues Palmer lacks standing to appeal the trial court's ruling on the motion for an IME because he is not an aggrieved party. Specifically, Fairchild contends Palmer was not denied a personal right by the trial court because the court granted him the right to an IME of Fairchild, and because Palmer was not entitled to have the IME performed by a specific physician. Fairchild relies on Rule 201(b), SCACR, which states "only a party aggrieved by an order, judgment, sentence or decision may appeal." Fairchild also relies on First Union National Bank of South Carolina v. Soden, 333 S.C. 554, 565, 511 S.E.2d 372, 378 (Ct. App. 1998) in which this court found:

> An aggrieved party is one who is aggrieved by the judgment or decree when it operates on his rights of property or bears directly on his interest, the word aggrieved referring to a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation. A party cannot appeal from a decision which does not affect his interest, however erroneous and prejudicial

As a general rule, appellate courts will be bound by the findings of the trial court on motions preliminary to trial when the evidence conflicts or the findings are supported by evidence and not clearly wrong or controlled by an error of law. City of Chester v. Addison, 277 S.C. 179, 182, 284 S.E.2d 579, 580 (1981); Askins v. Firedoor Corp., 281 S.C. 611, 615, 316 S.E.2d 713, 715 (Ct. App. 1984).

Palmer moved for an IME pursuant to Rule 35(a), SCRCP, and sought to have it performed by Dr. James Ballenger, a psychiatrist with whom Palmer consulted as an expert witness. At the motion hearing, Fairchild objected to Dr. Ballenger's relationship with Dr. Price, another expert in the case. Fairchild also argued Dr. Ballenger should not perform an IME because he had reviewed Fairchild's medical records to form an opinion and would be biased. Judge Young ruled that Fairchild had raised a reasonable objection and informed the parties he would appoint another physician to perform the examination. After Palmer moved for reconsideration, Judge Young withdrew his order and recused himself from the case.

Subsequently, a second hearing was held off the record in Judge Buckner's chambers. Judge Buckner issued an order stating Palmer met the requirements of Rule 35(a), but Dr. Ballenger could not perform the exam because he was an expert witness for Palmer and had reviewed Fairchild's medical records. The order further stated there was no finding of bias on the part of Dr. Ballenger, but another physician who had not reviewed the records and had not been retained as an expert witness should perform the examination. The order gave Palmer the opportunity to submit alternate psychiatrists to perform the exam, but Palmer was unwilling to pay for another physician. Therefore, the trial court denied Palmer's motion to have Dr. Ballenger perform an IME of Fairchild. At trial, the court again stated that the motion for Dr. Ballenger to perform the IME was denied not because

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> it may be to the rights and interests of some other person.

Fairchild's argument lacks merit because the trial court's denial of Palmer's motion for an IME by Dr. Ballenger "bears directly on his interest."

of Dr. Ballenger's qualifications or whether he was biased, but because he was listed as an expert witness in Palmer's discovery responses. The trial court further stated that "independent means independent and that means no witness has previously been identified by the Plaintiff or the Defendant gives the independent medical exam."

Palmer argues Fairchild failed to raise a reasonable objection to his motion requesting Dr. Ballenger perform the IME. According to Rule 35(a) (emphasis added):

> In any case in which the amount in controversy exceeds $100,000 actual damages, and the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made, and shall be delivered to the person or persons making the examination.
>
> The physician of the party to be examined may be present at the examination. Unless the parties agree, or the court for good cause shown determines otherwise, the examination shall be in the county where the person to be examined, or his physician, resides. Special consideration shall be given to the convenience of the person to be examined and that of his physician in setting the time and place of the examination, and reasonable consideration shall be given to the convenience of the examining physician.

> Upon reasonable objection to the physician designated to make the examination, and if the parties shall fail to agree as to who shall make the examination, the court may designate a physician; but the fact that a physician was so designated shall not be admissible upon the trial.[6]

Per Rule 35, the court may designate a physician to perform a mental or physical examination upon a reasonable objection to the physician previously selected. Here, we find Fairchild had a reasonable basis to object to Dr. Ballenger because he had a pre-existing relationship with Palmer. Dr. Ballenger was listed as an expert witness for the defense and had reviewed Fairchild's medical records. We believe such a role and his previous involvement warrants a reasonable objection for the trial court to sustain. See Main v. Tony L. Scheston-Luxor Cab Co., 89 N.W.2d 865, 868 (Iowa 1958) (affirming the trial court's ruling sustaining the plaintiff's objection to the defendant's choice of physician to perform an IME because the physician was a client of defense counsel); Adkins v. Eitel, 206 N.E.2d 573, 575 (Ohio Ct. App. 1965) (holding the trial court abused its discretion in ordering the plaintiff to submit to a medical examination by a physician who was a neighbor and client of defense counsel); see also Powell v. U.S., 149 F.R.D. 122, 124 (E.D.Va. 1993) (citing Adkins, 206 N.E.2d at 575 and Main, 89 N.W.2d at 868) (noting a social, business, or attorney-client relationship between a physician and defense counsel would have been the basis for a valid objection to a physician selected to perform a medical examination). Accordingly, we find the trial court did not abuse its discretion by denying Palmer's motion for an IME by Dr. Ballenger and affirm its decision.

## V. Directed Verdict

Finally, Palmer argues the trial court erred in directing a verdict for Fairchild on the issue of comparative negligence. Specifically, Palmer contends Fairchild did not take sufficient measures to avoid the accident. Based on Fairchild's conduct, Palmer maintains the jury should have been permitted to consider whether Fairchild acted negligently. Fairchild

[6] The second paragraph of Rule 35, SCRCP, is not a part of the federal rule.

maintains there is no factual issue about her conduct from which a jury could have reasonably concluded she was comparatively negligent.[7] We agree with Fairchild.

When evidence presented at trial yields only one conclusion concerning liability, the trial court may properly grant a motion for directed verdict. See Ecclesiastes Prod. Ministries v. Outparcel Assocs., 374 S.C. 483, 490, 649 S.E.2d 494, 497 (Ct. App. 2007) ("A motion for directed verdict goes to the entire case and may be granted only when the evidence raises no issue for the jury as to liability."). So long as no more than one inference is created from the evidence presented, a jury issue is not created, and the trial court is proper in directing a verdict. Henson v. Int'l Paper Co., 358 S.C. 133, 147, 594 S.E.2d 499, 506 (Ct. App. 2004) (holding when the evidence is susceptible of more than one reasonable inference, a jury issue is created and the court may not grant a directed verdict).

Palmer argues Fairchild "flashing" her brakes was not a sufficient warning to the traffic behind her. He contends Fairchild's testimony that she coasted for a quarter of a mile before the accident could reasonably be construed to mean that she was decelerating without the warning of her brake lights to the traffic behind her. Furthermore, Palmer argues Fairchild failed to take adequate measures to prepare for the oncoming hazard and thus she was forced to make an abrupt stop. Therefore, Palmer contends the question of Fairchild's negligence was for the jury to decide.

Fairchild maintains her testimony indicates she never took her foot off the brake as she approached the trailer. She argues motorists do not have a duty to apply their brakes in a certain way to adequately warn other

[7] Fairchild argues Palmer failed to make a proper post-trial motion, and therefore, the comparative negligence issue is not properly before the court. Specifically, Fairchild maintains Palmer never asked the trial court for a new trial or cited any error with respect to its ruling on comparative negligence. At the close of the evidence, the trial court granted Fairchild's motion for a directed verdict. We believe this issue is properly before the court because it was raised to and ruled upon by the trial court.

motorists. Fairchild contends the testimony at trial indicated Palmer saw her slowing down immediately after the cars in front of them moved to the right lane and he began applying his brakes because he realized she was slowing down. Moreover, Fairchild notes Palmer admitted in his testimony she made a safe choice in operating her vehicle under the circumstances.

"In order to establish a cause of action in negligence, a plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty." Snavely v. AMISUB of S.C., Inc., 379 S.C. 386, 394, 665 S.E.2d 222, 226 (Ct. App. 2008). A plaintiff may only recover damages if his own negligence is not greater than that of the defendant. Id. A determination of the degrees of negligence attributable to the plaintiff and the defendant presents a question of fact for the jury to decide. Id. at 394-95, 665 S.E.2d at 226. "In a comparative negligence case, the trial court should grant a motion for directed verdict if the sole reasonable inference from the evidence is that the non-moving party's negligence exceeded fifty percent." Hurd v. Williamsburg County, 363 S.C. 421, 429, 611 S.E.2d 488, 492 (2005).

As Fairchild notes, under South Carolina law, motorists do not have a duty to apply their brakes in a certain way to adequately warn other motorists. According to section 56-5-2150(c) of the South Carolina Code (2006): "No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal in the manner provided herein to the driver of any vehicle immediately to the rear when there is opportunity to give such signal." Appropriate signals are defined as hand signals and signal lamps. S.C. Code Ann. § 56-5-2180(a) (2006).

Fairchild testified at trial and in her deposition that she "flashed" her brakes to indicate to the motorists behind her she may have to stop. She further testified she had her foot on the brake as she continued to coast in order to stay ahead of the car behind her and not hit the trailer obstructing the highway. While Fairchild testified she accelerated after twice applying the brakes in order to say ahead of the traffic behind her, the evidence indicates she properly signaled she was slowing down and preparing to stop. Moreover, Palmer testified he saw Fairchild's brake lights after the cars

between his and Fairchild's moved to the right lane. Palmer also testified Fairchild made the safe choice when she slowed down, signaled to traffic behind her, maintained control of her vehicle, and avoided impact with the trailer. Therefore, the evidence in the record indicates Fairchild did not breach her duty to signal to the motorists traveling behind her when she was slowing down and preparing to stop.

Palmer also argues Fairchild saw the trailer obstructing the road and did not take sufficient measures to avoid it until the last possible moment. Palmer contends it was improper for Fairchild to coast for a quarter of a mile down the highway and that a reasonable jury could have concluded Fairchild saw the hazard ahead and did not react properly. Evidence in the record indicates Fairchild saw the trailer in the roadway and slowed down to avoid impact. Palmer presented no evidence indicating Fairchild should have reacted differently when she saw the trailer blocking her lane of the highway. Moreover, motorists in South Carolina are not under any duty to apply their brakes in a certain way when slowing down. Thus, because Palmer failed to offer evidence Fairchild violated traffic laws, was speeding or following too closely, or any other evidence to support an inference of negligence, we affirm the trial court's grant of a directed verdict on the issue of comparative negligence. See Hurd, 363 S.C. at 429, 611 S.E.2d at 492 ("In a comparative negligence case, the trial court should grant a motion for directed verdict if the sole reasonable inference from the evidence is that the non-moving party's negligence exceeded fifty percent.").

## CONCLUSION

We reverse the trial court's decision not to instruct the jury on the substance of Fairchild's requested charges and reverse and remand this case for a new trial. Further, we also find the trial court erred in directing a verdict in favor of Palmer on punitive damages. Accordingly, on remand, the trial court should submit punitive damages to the jury. Because reversing the trial court on its failure to instruct the jury on certain charges will result in a new trial, we do not need to address whether the trial court erred in refusing to grant a new trial absolute or a new trial nisi additur. We affirm the trial court's decision regarding the IME and affirm the trial court's decision to

direct Fairchild's verdict on comparative negligence. The decision of the trial court is therefore

**AFFIRMED IN PART, REVERSED IN PART, and REMANDED.**

**HEARN, C.J., and PIEPER, J., concur.**